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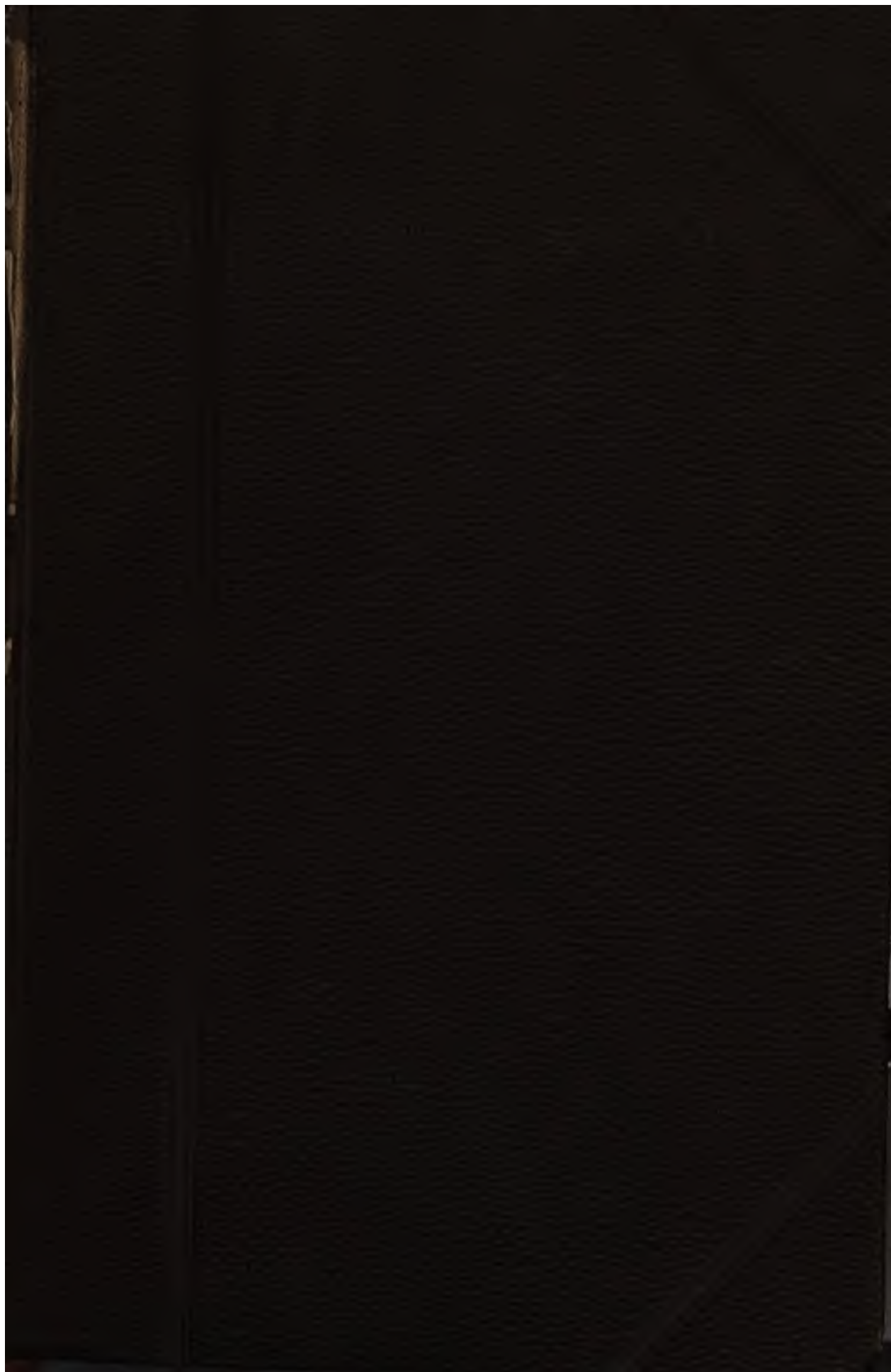
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THE  
SALE OF GOODS  
AND  
COMMERCIAL AGENCY.



THE LAW  
RELATING TO THE  
SALE OF GOODS  
AND  
COMMERCIAL AGENCY.

BY  
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## PREFACE.

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THE following pages treat of the law relating to the Sale of Goods and a portion of the law relating to Agency.

In regard to the portion of the work relating to the Sale of Goods, I must acknowledge my great obligations to the existing works of Mr. (now Lord) Blackburn, and Mr. Benjamin. I have used them as guides and consulted them on every point; but in all cases have formed an independent judgment as to the principles to be gathered from the common sources.

The scope of the work, so far as relates to the Sale of Goods, requires no remark except that it is extended to topics indirectly related to Sale, in the endeavour to deal completely with the whole subject of title to *the property* in goods.

In regard to Agency, the scope of the work has been determined *first* by the object of supplementing the former part by matter belonging to the law of Agency which also more or less directly relates to the Sale of Goods, and *secondly*, by selecting out of the large field of Agency, those topics which most frequently require to be dealt with by men of business and lawyers engaged in our great commercial centres.

The law treated of is that administered by English Courts, and illustrations from other sources have been employed sparingly. The point of view is in fact that of an English lawyer. "For we use" (to paraphrase the words of the Athenian Statesman) "a system not emulous of the laws of our neighbours; but ourselves being an example to others rather than imitating them."

R. CAMPBELL.

13, OLD SQUARE, LINCOLN'S INN,  
*October, 1881.*

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ON THE

# SALE OF GOODS.

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## PART I.

### LIMITS OF THE SUBJECT.

---

I PROPOSE to treat of the *sale of goods*, and in the first place I must define—

PART I.  
§ 1.

Sect. I.—What is meant by sale.

Sect. II.—What is meant by *goods* when we speak of “the sale of goods.”

#### SECTION I.—WHAT IS MEANT BY SALE.

Sale, according to the Civil Law in the time of Justinian, and according to the modern systems of law which avowedly adopt the principles of the Civil Law, is considered as a *contract* between the owner of a thing and another person whereby the parties consent to the transfer of property in the thing from the one to the other, and the payment by the latter to the former of a certain sum of money (price).

Sale according  
to the Civil Law.

In English law sale, considered as a contract, differs from the above definition in this, that the obligation contracted by the second party is not necessarily payment of a certain sum of money, but may consist of the render of value of any description. The time and manner of the transfer of the property, as well as of the render of value, may also be specified and made terms of the contract.

English law :  
“value” instead  
of “price.”

PART I.  
§ 1.

Sale in English law is sometimes not only a contract but also a conveyance.

In English law sale is sometimes viewed not only as a contract, but as a conveyance of property. Where the sale is of specific goods and the intention is that the property shall be immediately transferred, the transfer is deemed in law to be actually made, and the change of possession (*traditio*) which by the Civil Law (Justinian, Inst. III. 23, § 3) was deemed necessary to transfer the property, is for that purpose dispensed with. Where the value to be rendered consists of money, it is, generally speaking, also necessary, in order that the sale may operate as a conveyance, that nothing remains to be done to the goods for ascertaining the price: *e.g.*, if the price depend upon weight or number, the goods must have been weighed or counted. This seems to be a trace of the Civil Law principle that a certain price was necessary to constitute the contract.

As the contract itself has thus, under certain conditions, the effect of a conveyance, the following terms have been adopted by way of distinction:—

Sale executed (bargain and sale) and executory.

When the transfer of property is completed *uno ictu* with the contract itself, the contract is said to be *executed*, and the transaction is, in the technical language of English law, called a *bargain and sale*. When the transfer is not so completed, and it is meant that there has been no conveyance but only a contract, the sale or contract is said to be *executory*.

It will be seen above, that by the Civil Law the contract was perfected by consent. This is also the case by the Common Law of England, but by *statute*, further criteria have, in a very large class of cases, been rendered necessary. These will be considered, with reference to the sale of goods, in the part of this work relating to the 17th section of the Statute of Frauds.

Definition of sale according to English law.

Sale, considered as a contract, may be defined, agreeably to English law, as

*An agreement made between a person having power to dispose of the property in a thing (who is called the seller) and another person (called the buyer) with the joint intention, expressed as by law required, that the property in the thing shall, at such time and in such a manner as is then specified,*

*be transferred to the buyer in consideration of value to be rendered by the buyer, and vice versa.*

PART I.  
§ 2.

SECTION II.—WHAT ARE “GOODS” CONSIDERED AS THE OBJECTS OF SALE.

The objects of the contract of sale are either *things properly so called, i.e., tangible* things, more accurately defined by Austin as “such permanent objects not being persons as are sensible or perceptible by the senses;” or they may be things intangible—the *res incorporales* of the Roman Law; including the rights known to English law under the technical names, “estates and terms in land,” “incorporeal hereditaments,” “choses in action,” “shares” (in a railway or joint-stock company), “stock” (in the public funds), “copyright,” “patent,” “goodwill;” and generally all rights other than the right of property in a tangible thing. In the case of *things properly so called*, sale contemplates, as I have said, the transfer of property in the thing: in the case of things intangible it would be more correct to say that sale contemplates the transfer of the *thing* (*i.e., right*) itself.

Objects of sale :  
Things proper,  
or tangible  
things ;—

*Res incorporales.*

Examples of the  
latter.

In treating of things as the objects of sale, I shall confine myself, in the first instance, to things properly so called, according to Austin’s definition, with the exception of current money and land.

This treatise  
confined, in the  
first instance, to  
tangible things,  
excluding land  
and ships ;

Of *res incorporales* I lay aside—as proper subjects of mercantile law, but not within my present scope—*choses in action*, *shares*, *copyright*, *patent*, and *goodwill*.

I lay aside altogether, as not the proper concern of this treatise, *land*, *estates and terms in land*, *incorporeal hereditaments*, and the documents of title relating to them. These are not the direct or immediate objects of commerce in the ordinary sense of the word, but are indirectly related to commercial business, *first*, by providing the site and buildings where business is carried on; *secondly*, by supplying a basis of credit; and *thirdly*, as property available, on the failure of solvency and credit, to be sold for the benefit of the creditors. The sale of the various rights in land is complicated by so many peculiarities as to be properly the subject of a separate treatise, and upon this subject I refer generally to the exhaustive and recently edited works of Mr. Dart on Vendors and Purchasers,

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§ 2.

and of Mr. Justice Fry and Mr. W. D. Rawlins on Specific Performance.

I, further, lay aside current money, because, where an element in sale, it constitutes, according to ordinary language, not the thing sold, but the equivalent or price for which the thing, the object of the contract, is sold.

That is to say,  
to "goods."

The remaining objects are ships, and tangible things other than land and ships. This residue of things I designate in this treatise by the name of "goods." I exclude ships, *first*, because it would not be in accordance with established language to include them in the term goods; *secondly*, because, with regard to the transfer of property in them and otherwise, they are the subject of special statutory enactments; and *thirdly*, because much that is said regarding goods (*e.g.*, as to *transitus*, warehousing, &c.) is, from the nature of the case, inapplicable to ships, and *vice versa*; and it is therefore inevitable that I should, in the sequel, confine myself to merely occasional and incidental mention of ships, referring the reader for the law regarding them to the special treatises on the subject.

This restricted use of the word "goods" agrees with the ordinary commercial application of the term; and the exclusion of *res incorporales* from the category of goods agrees also with the meaning judicially assigned to the term as employed in the Stamp Acts and in the Statute of Frauds (see p. 22, *post*). It must be remembered, however, that "goods," as the word is used in relation to probate and administration, and the words "goods and chattels," as used in a variety of legal relations, have a wider application, including a variety of *res incorporales*. For example, the price of railway shares may be recovered in an action for "goods and chattels sold and delivered" (*Lawton v. Hickman*, 9 Q. B. 563); shares in a joint-stock company (where the legal title is capable of transfer) are "goods and chattels" within the reputed ownership clause of the Bankruptcy Acts, and are not within the exception described by the words "choses in action" (*Re Jackson, Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354); and the words "goods and chattels" in a writ of *fi. fa.*, as describing the property which the sheriff is to take in execution, not only include chattels real, but are extended by statute (1 & 2 Vict. c. 110) to include money and various *res incorporales*.



To complete the definition of "goods" it remains for me to show, in some detail, how *goods* are distinguished from *land*.

PART I.  
§ 2.

The distinction is often attended with difficulty, owing to the rules of law by which that which primarily is regarded as a chattel may, under circumstances not materially affecting its physical identity, become land, and *vice versa*.

How "goods" distinguished from land.

I shall consider under what circumstances a chattel, or "goods," in the sense above laid down, may become according to English law part of the land.

And how become land.

The general rule has been expressed by the maxim "quod plantatur solo, solo cedit" (*Lee v. Risdon*, 7 Taunt. 191).

General maxim :  
*Quod plantatur solo, solo cedit.*

In applying this maxim the broad features of the *criteria* are easy to understand. A house or other building substantially erected and firmly fixed to foundations let into the ground (including the materials of which it consists, and which before their incorporation into the building were chattels) is undoubtedly, in law, deemed part of the land.

But there are other cases, in which a chattel becomes either physically connected, or in its use associated, with objects substantially and permanently attached to the soil, so as itself to lose the character of a chattel, and to become in law part of the land. These cases I proceed to state and exemplify.

Various modes in which a chattel may become part of the land.

A chattel becomes, in law, part of the land :—

(a) *When fixed in a permanent manner to land or a building ; (that is to say) so as not to be capable of being removed without damage to the land or building to which it is attached ; or where the chattel and structure of the building have been so adapted, that on the removal of the chattel, the adjacent parts of the structure become inconvenient, disfigured, or objectless.*

(a) By being fixed in a permanent manner.

Of chattels in this predicament I give the following instances :—

1. A fixed steam-engine with its boilers and shafting (*Climie v. Wood*, L. R. 3 Ex. 257, 4 Ex. 328 ; *Longbottom v. Berry*, L. R. 5 Q. B. 123).

2. Looms of the following description :—Each loom was

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§ 2.

about 7 feet long by 3 feet wide, and from 3 to 4 feet high; and weighed about 7 or 8 hundredweight. Holes were drilled through the iron feet of the looms, and nails were driven through these holes into wooden plugs which were themselves tightly driven into holes in the stone flooring of the rooms in the mill. This was done to keep the looms steady, and in a true direction perpendicular to the line of shafting. The looms could not be removed without drawing the nails (*Holland v. Hodgson*, L. R. 7 C. P. 328; compare cases there cited, and *Boyd v. Shorrocks*, L. R. 5 Eq. 72).

3. Pictured tapestry and mirrors fixed to the walls of a house by screws or otherwise in such a way that they could not be removed without leaving the wall disfigured, although the disfigured parts could easily be brought to the same condition as the rest of the wall. (*D'Eyncourt v. Gregory*,<sup>1</sup> L. R. 3 Eq. 282). Pictures and glasses put up in lieu of wainscot (*Cave v. Cave*, 2 Vern. 508).

4. Weighing machines deposited in holes dug in the earth and lined with brickwork, so that the weighing plate was level with the surface of the ground, but the machines being not fixed to the brickwork. (*Ex parte Astbury, &c.*, L. R. 4 Ch. 630.)

(b) Or in a quasi-permanent manner.

(b) *When fixed or set in what has been called a quasi permanent manner, that is to say, where the manner of affixing only fails to bring the case within the last category by reason of some contrivance which obviates or renders infinitesimal the damage which would otherwise be sustained by removal.*

Of this principle the following machines, as described in the case of *Longbottom v. Berry* (L. R. 5 Q. B. 126) will furnish an illustration.

A *shake-willey* is a machine employed on the premises of a

<sup>1</sup> In *D'Eyncourt v. Gregory*, which was a case between tenant for life and remainderman, a distinction was made between those pictures, &c., which had been made part of the ornamental design of the wall, and those which although fixed with screws, &c., were not part of

such ornamental design. Had the case been simply between heir and executor, or between mortgagee of the freehold and the mortgagor's assignee of chattels, probably even the latter class would have been considered part of the freehold under the principle (b) next stated.

cloth manufacturer for detaching the different fibres of wool and then mixing or blending the same together before the wool is carried to a machine called "the tenter-hook willey." The shake-willey stands about six feet high, is about six feet broad and six feet long, and weighs about fifteen hundredweight or thereabouts.

One of the shake-willeys in question in the case was attached to the fabric of the mill in the following way: A hole having been drilled in the flags forming the floor of the mill, a bolt with a screw at the top thereof was inserted and fastened in the hole by means of melted lead, so as to leave the top of the bolt standing from one to three inches above the flags. In the feet or framework of the machine are holes large enough to admit of the bolt passing through it. When the machine was to be fixed in its place, it was lifted up and placed on the floor of the mill in such a way that the bolt should pass through the holes in the feet or framework thereof, and a nut was then screwed on to the top of the bolt, and the machine was thereby made firm and prevented oscillating or being moved from its place when in use. The other shake-willey was attached to the floor of the mill as follows: Holes were drilled in the flags forming the floor of the mill, and the machine was placed on the floor so that certain holes in the framework, which are made for that purpose, were placed over the holes drilled in the flags, wooden pegs or wedges were then driven through the holes in the framework of the machine into the holes in the floor, until the pegs or wedges were firmly fixed, and still further to fix the machine, a nail or iron spike was driven into each such peg or wedge to cause it to expand and hold the more firmly. The machine could not be moved without pulling out or breaking, or damaging the pegs or wedges, nor could the other shake-willey be moved without unscrewing the nuts; but when the nuts were unscrewed in the one case, and the pegs or wedges pulled out or broken in the other case, the machines could be removed. This removal of the nuts could be effected in a few minutes by an unskilled workman. The object of the fixings was to insure steadiness in working and to keep taut the belt or strap by which motion was communicated to the machine when in gear.

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Both the shake-willeys were held to be part of the land, and therefore to be comprised in a mortgage made to a banker by deposit of the title deeds of the premises. It may be observed that these machines could without much straining of language have been brought within the first category (a), inasmuch as the removal of the first machine and its nut would leave an objectless iron bolt let into the ground, and the removal of the second machine would leave an objectless hole in the floor. But I think it may be said generally that any contrivance of screws by which the damage of removal of fixtures is more or less obviated, does not affect the character of the annexation in a question whether the chattel has become part of the land; and I think this is what is meant by the expression *quasi-permanent* employed in the cases by some of the judges.

(c) By being an essential part of a machine or thing so fixed.

(c) *When forming (although not physically attached to the land), an essential part of a machine or thing fixed in a permanent or quasi-permanent manner to land or a building.*

The following are *illustrations* of this principle:—

1. An upper millstone belonging to a mill which is itself part of the land (*Walmsley v. Milne*, 7 C. B. N. S. 115; *Wystow's case*, cited in *Liford's case*, 11 Co. 50).

2. The movable part of a spinning mule, a machine consisting of two parts, each essential to the working of the other, and one of which is firmly fixed to the floor of a mill by screws or otherwise, such fixing being essential to its working and keeping the strap taut which keeps it in gear (*Longbottom v. Berry*, L. R. 5 Q. B. 129).

3. A set of *rolls*, being movable articles fitted to a rolling machine attached to the land or building. And also duplicate rolls fitted to the same machine, and (although not necessary) making it a more perfect machine (*Ex parte Astbury*, L. R. 4 Ch. 630). But *not* other rolls which had been purchased for the machine but required something to be done to fit them to it.<sup>1</sup> So in *Tripp v. Armitage*, 4 M. & W. 657, where there was a contract to build an hotel, sash frames intended for the

<sup>1</sup> In this case a doubt is expressed whether the *dictum* of Fitzherbert in *Wystow's case* is well founded.

This *dictum* was a suggestion that perhaps a *spare* millstone might be distrained.

building, but which had not been fitted, were held not to be parts of the building.

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(d) *When set in a fixed place for permanent use and enjoyment in connexion with the land or a building thereon.*

(d) When set in a fixed place for permanent use in connexion with the land.

Of this the following are illustrations :—

1. A floating pier or landing-stage permanently moored on a fixed site (*Forrest v. Greenwich*, 8 E. & B. 890).<sup>1</sup>

2. Sculptured marble vases set within a house, resting by their own weight and not physically attached to the building; sculptured lions resting by their weight at the head of a stone staircase going into the garden of the same house; heavy marble slabs forming garden seats, resting by their own weight on supports;—all forming part of the architectural plan and permanently designed system of a house and its ornamental grounds (*D'Eyncourt v. Gregory*, L. R. 3 Eq. 387).

To the same category may be referred the sundial and colossal statue in an American case, *Snedeker v. Warring* (2 Kern. 170; Brown's Law of Fixtures, 4th ed. p. 168).

It is difficult, on principle, to distinguish the *granary* in *Wiltshire v. Cottrell*, 1 E. & B. 674, which was held to be a mere chattel, from the things held to be part of the land under the last category. This only illustrates the difficulty of marking out the distinction by any general words, and the necessity of the minuteness observed in the above illustrations. Assuming the necessity of maintaining the consistency, in principle, of *Wiltshire v. Cottrell* with the other cases, it can only be said that the judges who pronounced the opinion upon the *granary*

<sup>1</sup> The case here cited was a question of rating under the poor-law. Compare and consider the cases of *Watkins v. Overseers of Milton-cum-Gravesend*, L. R. 3 Q. B. 350; *Grant v. Local Board of Oxford*, L. R. 4 Q. B. 9; *Cory v. Churchwardens of Greenwich*, L. R. 7 C. P. 499; *Cory v. Bristow*, L. R. 10 C. P. 504, reversed by Court of Appeal, 1 C. P. D. 54, 2 Ap. Ca. 262; *Laing v. Bishop Wearmouth*, 3 Q. B. D. 299. The questions arising under the poor-law are not

necessarily solved by the question whether the subject is land or a chattel. But that question is very material to the question of rating, and I think the conditions which make a subject rateable could hardly exist unless the subject were in law part of the soil. See in particular *Reg. v. North Staffordshire Ry. Co.*, 30 L. J. (M. C.) 68, 72, cited in *Reg. v. Lee*, L. R. 1 Q. B. 250; and *Cory v. Bristow* (*per Mellish*) L. R. 1 C. P. D. 54, 56; 2 Ap. Ca. 262.

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did not associate the thing with the permanent use of the land as a farm. On the same principle the old case commonly referred to as the *Cider-mill case*, seems to have been distinguished. In the case of *Fisher v. Dixon*, 12 H. of L. Ca. 331, Lord Campbell disposed of that case by citing the remark of Moses in *The Vicar of Wakefield*, "I hope that if my sister marries young Farmer Flamstead *he will lend us his cider-mill.*" Evidently Lord Campbell had not lived in a cider country.

Analysis of the  
case of *Hellawell*  
*v. Eastwood*.

It seems necessary here to analyse the judgment in *Hellawell v. Eastwood* (6 Exch. Rep. 295) which, in subsequent cases, has been very frequently cited, and treated by the judges with the utmost respect, although they have, I believe invariably, decided against the party citing it. The question in *Hellawell v. Eastwood* was whether certain cotton spinning machines called "mules," fixed by screws into the floor but easily removable, were while so remaining attached, distrainable for rent. Baron Parke, after laying down the law that things fixed to the freehold and which became parcel of it could not be distrained, stated that the question whether the machines when fixed were parcel of the freehold, was a question of fact and depended on two considerations:—"1st, the mode of annexation to the soil or fabric of the house and the extent to which it is united to them,—whether it can be easily removed, *intégrè, salvè et commodè* or not, without injury to itself or the fabric of the building; 2ndly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling (in the language of the Civil Law, *perpetui usus causâ*, or in that of the Year Books, *pour un profit del inheritance*), or merely for a temporary purpose or the more complete enjoyment and use of it as a chattel." He continues,—“Now in considering this case we cannot doubt that the machines never became part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use *as chattels*. They

were never a part of the freehold any more than a carpet would be, which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held in similar cases to be removable."

*Hellawell v. Eastwood* was decided in 1851. It was cited in *Wiltshear v. Cottrell* (1853), 1 E. & B. 674, 22 L. J. Q. B. 177; in *Mather v. Fraser*, 2 K. & J. 536; in *Walmsley v. Milne* (1860), 29 L. J. C. P. 171; in *Climie v. Wood*, L. R. 3 Ex. 257, 4 Ex. 328; in *Turner v. Cameron*, L. R. 5 Q. B. 313; in *Longbottom v. Berry*, L. R. 5 Q. B. 137; and in *Holland v. Hodgson*, L. R. 7 C. P. 328. In all these cases it was cited by the party endeavouring to make out that the things in question remained chattels notwithstanding some slight attachment to the soil. In every case such endeavour was unsuccessful, and in most cases the judge, with equal want of success, attempted to distinguish the facts of the case before them from those in *Hellawell v. Eastwood*. In *Holland v. Hodgson*, L. R. 7 C. P. 328 (where *Hellawell v. Eastwood* is much discussed) it is pointed out that V.-C. Wood in his judgment in the case of *Mather v. Fraser* distinguished *Hellawell v. Eastwood* on the erroneous supposition that tenants' fixtures could be distrained for rent. Yet the judges in *Holland v. Hodgson* still attempt to distinguish *Hellawell v. Eastwood* on the ground that it was a case between landlord and tenant. But if it is admitted that tenants' fixtures cannot be distrained by the landlord, it is hard to see how anything could be subject to distress as a chattel which as between mortgagor and mortgagee would be deemed part of the land.<sup>1</sup>

The result appears to be that the decision upon the facts in *Hellawell v. Eastwood* is virtually overruled by more recent authority; and that the criteria of distinction laid down by Baron Parke in that case require some modification. They

<sup>1</sup> *In re North Yorkshire Iron Co.*, June 28, 1879, reported in the *Weekly Notes*, p. 153, V.-C. Hall appears to have held certain chattels distrainable which were affixed with screws, &c. But the reasons for the judgment are not given in the report.

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appear however still valid, if explained and modified as follows:—1st. As to the criterion whether the thing can be removed without injury to itself or the fabric of the building; the *injury* (or rather damage) must be understood as not necessarily appreciable damage, but as extending to that kind of slight damage which may be caused by tearing out nails or taking out screws. 2ndly. If the *mode* of annexation is such as above described, it becomes immaterial to inquire what was the object and purpose of the annexation, but on the other hand if there be no physical annexation, but only juxtaposition or relation in respect of use, the object and purpose of that juxtaposition or the nature of that relation may be the proper subject of inquiry in order to see whether the thing has become part of the land within the principles of the above heads (c) and (d), pp. 8 and 9, *supra*.

It is to be confessed that the example of a carpet referred to in *Hellawell v. Eastwood*, is difficult to exclude from any general description of things which are fixed so as to become part of the land. The carpet is doubtless a chattel, though fixed with nails or tacks; and the only explanation to be given is that the annexation is of so *very* slight a character, and the custom of regarding the thing as a chattel so universal, that the physical fact of annexation is disregarded.

It seems possible that there may still be room for controversy in regard to some articles of domestic ornament and use, especially as between heir and executor. Several cases cited in Williams on Executors, 7th edit., p. 736, &c., seem to relax the line beyond the limits which the rules stated in the text seem to authorize. Those cases, however (*e.g.*, *Squire v. Mayer*, Trin. Term. 1701; *Beck v. Rebow*, 1 P. Wms. 94, and the *nisi prius* case of *Harvey v. Harvey*, 2 Stra. 1141, as well as the dictum of Baron Parke in *Hellawell v. Eastwood* (p. 10, *supra*), seem hardly consistent with the strict rule which the most recent authorities (*e.g.*, *Longbottom v. Berry*, &c.) tend to maintain, and which is applicable, according to the principle of *Fisher v. Dixon*, 12 Cl. & Fin. 312, to a question between heir and executor, just as much as to a question between a mortgagee of the freehold and the assignees of the mortgagor. The articles here referred to would pass under a bequest of



"furniture" (*Paton v. Sheppard*, 10 Sim. 186), and possibly this supplies a reason why questions as to the strict rights of heir and executor do not often arise in regard to them.

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It will be observed that the general rule of law, *quod plantatur solo, solo cedit* has been applied very strictly in this sense, that the conversion of a chattel into land is very easily inferred by law: but inasmuch as the strict rule, if carried to all its legal consequences, would in a large number of cases work injustice, it has been, in certain classes of cases, relaxed; that is to say, in regard to certain legal effects the line of demarcation has been shifted so as to permit the retention by a chattel of its character as such, notwithstanding some degree of annexation to the soil.

The maxim  
'*quod plantatur solo, solo cedit*'  
strictly interpreted.

But relaxed in  
certain classes of  
cases.

1. *The strict rule is relaxed to some extent in questions between a tenant for life or in tail, and the remainderman in a settled estate* (*Lawton v. Lawton*, 3 Atk. 16; *Elwes v. Mawe*, 3 East, 38; *Wiltshier v. Cottrell*, 1 E. & B. 674; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382).

(1) Between  
tenant for life  
and remainder-  
man in a settled  
estate.

This relaxation, in the case of fixtures put up by the particular tenant for the purposes of trade, has been said to arise from "the consideration of public expediency," namely, "that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term" (*per* Lord Hardwicke in *Lawton v. Lawton*, 3 Atk. 14; Williams on Executors, 7th edit., p. 741), and in the case of *Lawton v. Lawton*, which was a creditor's suit against the estate of a tenant for life of a colliery, who had brought upon the premises a movable fire-engine, and fixed it there for the purpose of convenient working, Lord Hardwicke held that the engine belonged to the personal estate. In questions arising as to fixtures put up by the particular tenant for ornament or domestic convenience, the only reason for a relaxation of the ordinary rule of law seems to be the presumed intention of the settlor. There is very little direct authority to show what in such a case is the extent of the relaxation. It extends at least to this, that framed pictures and looking-glasses brought there by the particular tenant, and by him fixed with nails or screws

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to the walls of a room; are deemed part of his personal estate, provided they were not set "*in lieu of wainscot*," or in lieu of panelling or other part of the decorative design of the wall itself, so that their removal would leave the walls disfigured and incomplete (*D'Eyncourt v. Gregory*, L. R. 3 Eq. 396.)

(2) Between  
landlord and  
tenant.

2. *The line of demarcation is relaxed to a greater extent, and on a better defined principle, in questions between landlord and tenant.*

Here the strict rule of law is said to be relaxed "in favour of trade." This is a short way of expressing what would perhaps be more correctly put as follows: The relation of landlord and tenant being based upon contract, the contracting parties are of course at liberty as between themselves to depart from the maxim, "*quicquid plantatur solo, &c.*" It has been found generally convenient, and has become customary, for the parties to a contract of tenancy to vary the legal relation expressed by that maxim, and the law accordingly presumes the intention to make such departure, and implies a term of the contract for such purpose.

The things in respect of which the rule of law is relaxed in favour of trade in the sense last mentioned are commonly called "*tenants' fixtures*," and may be described generally as, *Things brought on the land by the tenant with the consent, express or implied, of the landlord, and which are capable of being removed without considerable damage to the freehold. For the convenience of trade and in accordance with the presumed intention of parties, the tenant is deemed to be entitled, during his tenancy,*<sup>1</sup> *to remove these fixtures, reinstating the premises.* This right of the tenant to sever and remove the fixtures may be exercised by the person authorised under a writ of execution to seize the goods and chattels of his debtor, provided the latter has not an estate of freehold in the land to

<sup>1</sup> See *Pugh v. Arton*, L. R. 8 Eq. 626, and cases there referred to, and see *Elwes v. Mawe*, and notes in Smith's Leading Cases, vol. i. For the details of the subject of tenants' fixtures, on which it would

be out of place here to enlarge, I refer to the notes in Smith's Leading Cases above mentioned, to Woodfall's Landlord and Tenant, p. 521, &c., and to Brown's Law of Fixtures.

which the things are affixed, in which case they are treated (so far as relates to the execution creditor) as part of the freehold.

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From what is said above, it will be seen under what circumstances a chattel becomes in law part of the land. Conversely a thing which is part of the land becomes a chattel, generally speaking, by severance, so as to be rendered capable of use as a separate and movable object.

How that which is part of the land may be converted into a chattel.

There are exceptions in the case of certain things known in law as *emblements*; being things which, to certain effects, are treated by law as chattels, although remaining unsevered from the land. Emblements have been defined as "corn and other growth of the earth, which are produced annually, not spontaneously but by labour and industry, and are thence called *fructus industriales*" (Williams on Executors, 7th ed. p. 710). They comprise not only corn of all kinds, but other annual products, such as hemp, flax, saffron, melons, cucumbers, turnips, and carrots (Stephen's Commentaries, 6th ed. vol. ii. p. 236). Also teazles (*Kingsbury v. Collins*, 4 Bing. 202), potatoes (*Evans v. Roberts*, 5 B. & C. 832, *per* Bayley, J.), and hops (although they spring from old roots and so are not strictly within the definition), because they are annually manured and require cultivation (*Latham v. Attwood*, Cro. Car. 515, Williams on Executors, 7th ed. p. 711, and other authorities there cited). But not fruit growing on trees. And apparently not any crop which is not ordinarily reaped within the year in which the labour is expended upon it (*e.g.*, clover sown with barley and cropped more than a year after the sowing (*Graves v. Wild*, 5 B. & Ad. 105)). The trees and plants on the premises of a nurseryman or gardener and forming in fact his stock-in-trade are undoubtedly removable by him, as they necessarily must be for the carrying on of his business (*Penton v. Robart*, 2 East, 90, Lord Kenyon's judgment; *Elwes v. Mawe*, 3 East, 45, remark of Lawrence, J., note c). These are, in at least one work of authority (Williams on Executors, 7th ed. p. 711) classed with emblements. I am, however, inclined to think that they belong to the category of trade fixtures. I know of no decided case in which the question has arisen

Emblements.

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simply between heir and executor of the owner in fee of land using it for the purpose of his business as a nurseryman. Should such a case arise purely, the observations of Gibbs, J., in *Lee v. Risdon* (7 Taunt. 189, 190) would rather seem to point in favour of the heir.

Emblements  
deemed chattels  
to certain effects.

Emblements are deemed by law to be chattels and not part of the land to the following effects :—

1. When term  
expires at un-  
foreseen period.

1st. The tenant whose estate determines at a period which he is not in a condition to foresee, is entitled, even after his tenancy has determined, to cut, carry away and convert to his own use, as his own goods and chattels, the emblements on which he himself has expended the labour. This right at Common Law is superseded, in the case of a tenant at rack-rent whose tenancy determines by death or cesser of the estate of any landlord entitled for his life, by a statutory extension of his term *in lieu of his right to the emblements*, to the end of the then current year of his tenancy (14 & 15 Vict. c. 25, s. 1 ; *Lord Stradbroke v. Mulcahy*, 2 Ir. C. L. R. 406). The right to emblements remains in favour of a tenant who is not within the last-mentioned Act, and whose estate is determined either by the act of God or through the law otherwise than by his own fault ; *e.g.*, where the estate of the holder of a beneficial lease is terminated by the death of or forfeiture incurred by his landlord.

2. Upon death  
of owner of land  
in his own  
occupation.

2ndly. Upon the death of the owner in fee of land in his own occupation, the emblements devolve on the executor or administrator to the exclusion of the heir. The devise, however, of a particular piece of land will carry the emblements with it.

3. May be taken  
on a writ of  
execution.

3rdly. Emblements are liable to be taken upon a writ of execution directing a seizure of goods and chattels ; and it does not signify whether the person whose goods are directed to be seized, is a tenant for years or has a freehold estate. This has been considered a legal consequence of the rule that the emblements devolve, like other goods and chattels, on the personal representative (Stephen's Commentaries, 6th ed. vol. ii. p. 235).

4. May be dis-  
trained.

4thly. By statute (11 Geo. II., c. 19), a landlord may distrain

for arrears of rent "all sorts of corn and grass, hops, roots, pulse or other product whatsoever, which shall be growing on any part of the estates demised or holden." This was contrary to the principle of the common law, which held such things exempt as parcel of the freehold (Stephen's Commentaries, 6th ed. vol. ii. p. 235). The list of things here mentioned as capable of being distrained includes emblements as well as products which are not emblements.

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5thly. Whether emblements are an interest in land within the 4th section of the Statute of Frauds: or whether they are "goods" within the 17th section of the Statute, are questions which will be considered further on (Part IV. *post*).

5. Whether under 4th or 17th section of Statute of Frauds.

6thly. Emblements are not "personal chattels" within the meaning of the Bills of Sale Act, 1854 (*Brantom v. Griffiths*, 1 C. P. D. 349; 2 C. P. D. 212; *Ex parte Payne, In re Cross*, 11 Ch. D. 540). If, however, a tenant farmer having mortgaged his farming stock and growing crops and tenant right in the farm, remains in possession and afterwards severs the crops, and the mortgagee does not take possession before the bankruptcy of the farmer, it has been held under the Act of 1854 that the mortgage being unregistered was ineffectual in regard to those crops (*Ex parte National Mercantile Bank, In re Phillips*, 16 Ch. D. 104). By the 4th section of the Bills of Sale Act, 1878, "personal chattels" are expressly defined as including "growing crops" (when separately assigned or charged). And whether separately charged or not, the principle of the last cited decision will doubtless apply to them when severed by the tenant in possession.

6. Growing crops are now (when separately charged) personal chattels within the Bills of Sale Act.

It will be seen further on that in regard to the effect first above mentioned, emblements are in the same position with the class of fixtures called tenant's fixtures. They differ, however, from fixtures in these points, namely: 1stly. That fixtures do not in any case (with the doubtful exception referred to on p. 12, *ante*) descend to the personal representative; and 2ndly. That fixtures in the possession of the freehold tenant of the land are exempt from execution (Stephen's Commentaries, vol. ii. p. 239; *Winn v. Ingilby*, 5 Barn. & Ald. 625). 3rdly. That in no case are they subject to a distress for rent (Stephen's Commentaries,

In some respects, but not in all, emblements are in same position as tenant's fixtures.

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vol. ii. p. 240 ; C. Litt. 47 b ; *Gorton v. Falkner*, 4 T. R. 565).

Questions, to  
which rules  
apply, classified.

I proceed to enumerate various classes of questions in which it is necessary to distinguish goods or chattels from land, stating the rules applicable to each case.

1. Between heir  
and executor.

1. *Questions between heir or devisee of the real estate and executor.*

Here, generally, the strict rule of law applies (*Elwes v. Mawe*, 3 East, 38 ; *Fisher v. Dixon*, 12 Cl. & Fin. 312). But this is subject to the exception of emblements (p. 15, ante), and possibly to the further exception referred to in the concluding paragraph of the note on *Hellawell v. Eastwood*, (p. 12, ante).

2. Between  
mortgagee and  
mortgagor, and  
his assignees.

2. *Questions between a mortgagee of the land on the one hand and the mortgagor or those claiming through him, either as a trustee in bankruptcy or a particular assignee of chattels, on the other.*

Here the strict rule applies without exception (*Walmsley v. Milne*, 7 C. B. N. S. 115 ; *Climie v. Wood*, L. R. 3 Ex. 257, and 4 Ex. 328 (Ex. Ch.) ; *Ex parte Astbury*, L. R. 4 Ch. 630 ; *Culliwick v. Swindell*, L. R. 3 Eq. 249, which treated as overruled *Trappes v. Harter*, 2 Cr. & M. 153).

3. Between  
specific devisee  
and residuary  
legatee.

3. *Questions between a person claiming under a specific bequest of leasehold estate and the residuary legatee.*

Here the strict rule also applies (*In re Sharman's Estate*, *Sharman v. Rose*, May 2, 1873, Lord Chancellor for M. R., W. N. p. 99).

4. Questions of  
reputed owner-  
ship under the  
Bankruptcy  
Acts.

4. *Questions whether a thing comes within the description of "goods and chattels," so as to be within the reputed ownership clause of the Bankruptcy Acts: the one at present in force being section 15, subsec. 5 of "The Bankruptcy Act, 1869."*

Here the strict rule applies (*Horn v. Baker*, 9 East, 215 ; *Ex parte Lloyd*, 1 Mont. & Ayr. 494 ; *Ex parte Brown*, *In re Reed*, 9 Ch. D. 389).

5. Between  
tenant for life  
and remainder-  
man.

5. *Questions between tenant for life and remainderman in a settled estate.*

Here the strict rule is relaxed as to certain classes of fixtures (see p. 13, ante), which are considered to retain their character

of chattels ; and the emblements, although unsevered, are also considered as chattels (p. 16, *ante*).

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6. *Questions between tenant and landlord.*

6. Between tenant and landlord.

Here the strict rule is, as before seen (p. 14, *ante*), relaxed to a greater extent, and the emblements are likewise, in the case of the estate determining at a period which the tenant is not in a condition to foresee, considered as chattels. But in the case of a tenant at rack-rent whose tenancy determines by death, or cesser of the estate of any landlord entitled for his life, there is a statutory equivalent provided in lieu of the emblements (see p. 16, *ante*). Where a trustee in bankruptcy of the tenant disclaims, the right to remove the fixtures is gone because the disclaimer operates as a determination of the term as from the date of adjudication (*Ex parte Stephens. In re Lavies*, 7 Ch. D. 127 (C. A.)).

7. *Questions as to whether a thing can be seized under a writ of execution directing seizure of goods and chattels of a person not having a freehold estate in the land.*

7. Between execution creditor of tenant, and landlord.

By consequence from the relaxation, as between landlord and tenant, of the strict rule, the same relaxation applies between the execution creditor of the tenant and the landlord, so that the writ is available for seizure of all which would, as between the tenant himself and the landlord, be considered as chattels. As already seen (p. 16, *ante*), the emblements are also subject to be taken under this writ. This, however, is subject to the superior right of the landlord, who may distrain as above-mentioned (p. 16, *ante*).

8. *Questions whether a thing belonging to a tenant in fee or other freeholder in the land is a chattel and as such liable to be seized under a writ directing seizure of his goods and chattels.*

8. In execution against chattels of freeholder.

Here the strict rule applies, so that all kinds of fixtures would be considered as part of land (*Winn v. Ingilby*, 5 B. & Ad. 625), and they would be subject to attachment, not under the writ directing seizure of chattels, but along with the land, under an *elegit* or other process for attaching the freehold estate in the land. But the *emblements* in the case of a tenant having a freehold estate, and even a tenant in fee, may be seized under the former writ (p. 16, *ante*).

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9. Whether  
subject to  
distrain as a  
chattel.

9. *Questions whether a thing is a chattel and as such liable to be distrained.*

To these questions the same strict rule applies *generally* (*Turner v. Cameron*, L. R. 5 Q. B. 306; *Hellarwell v. Eastwood*, 6 Ex. 295, 20 L. J. Ex. 154, and see observations on this case, p. 10, *ante*). By the common law even *emblems* were exempt from distrain; but they, with certain other products not strictly emblems, are now by statute subject to distrain by the landlord as above mentioned (p. 16, *ante*).

10. Questions  
under Bills of  
Sale Act.

10. *Questions whether a thing passes under a conveyance as land or an interest in land, and not "personal chattels," so as to avoid the necessity of registering the conveyance as a bill of sale of personal chattels under "The Bills of Sale Act."*

In considering this question I must first consider the cases under the former Act, 17 & 18 Vict. c. 36, and then shortly advert to the difference of language between that Act and the Act of 1878 now in force, 41 & 42 Vict. c. 31, and to the effect of that difference.

In the first place I may observe that *the title of a mortgagee* of the freehold to the chattels which, in law, form part of the land under the strict rule above mentioned, was in no way affected by the former Act (*Mather v. Fraser*, 2 K. & J. 536). Nor is any question likely to arise under the Act now in force.

The cases relating to the right of a tenant for years to sever and take away the fixtures put up by him have been considered in a number of cases under the former Act, which led to very fine distinctions.

In *Boyd v. Shorrocks* (L. R. 5 Eq. 72), it was held by V.C. Wood, that where the lessee assigned by way of mortgage the land and the trade fixtures, this assignment need not, in order to be valid and effectual as a conveyance of the fixtures, be registered under the Bills of Sale Act. But the Vice-Chancellor's attention does not seem to have been drawn to the interpretation clause of the Act, which expressly defines "personal chattels" (the subject of the prescribed registration), as including "fixtures." His decision was accordingly not followed in the later cases of *Begbie v. Fenwick* (L. R. 8 Ch. 1075 *n.*), and *Hawtry v. Butlin* (L. R. 8 Q. B. 290); and these last were followed and V.C. Wood's decision dissented from by the Lord



Justices in *Ex parte Dalglish, In re Wilde* (L. R. 8 Ch. 1072). In the case of *Ex parte Barclay, In re Joyce* (L. R. 9 Ch. 576), where there was a mortgage by demise of leasehold premises, including fixtures, it was held good against the trustee in bankruptcy, and by these two last mentioned cases the test laid down was whether the mortgage gave power to the mortgagee to sever the fixtures from the premises and to deal with and sell them separately. These cases are all cited in the case of *Meux v. Jacobs*, in the House of Lords (L. R. 7 H. L. 481); but that case throws no light on the points in question, as it only decided that the adverse claimant, who was merely the holder of a later unregistered bill of sale who had taken possession under his security, was not a person within the protection of the Act. The decision in *Ex parte Dalglish* was, subsequently to that of *Ex parte Barclay*, followed in the case of *Ex parte Alexander, In re Elsie* (4 Ch. D. 503); *In re Trethowan, Ex parte Tweedy* (5 Ch. D. 399); and in *Ex parte Brown, In re Reed* (C. A.), 9 Ch. D. 389.

The rule to be deduced from the cases on the Act of 1854 appears to be that a mortgage by a tenant by an instrument giving power to sever the tenants' fixtures and deal with and sell them separately from the tenants' interest in the land to which they are attached, must, in order to be valid (so far as relates to these fixtures) against an execution creditor or trustee in bankruptcy, be registered under the Act; and that a mortgage which does not give such power will be good as regards the same fixtures although not registered. But it was still considered a reasonable course to register a mortgage of the latter class (*In re Lee's Trusts*, 13 Mar., 1875, W. N. p. 61).

The language of the Act of 1878 now in force, is different, and has been apparently framed to define and extend the rule laid down by the decisions. By this Act, section 4, "personal chattels" includes "(when separately assigned or charged) fixtures and growing crops;" but does not include "chattel interests in real estate, nor fixtures (except trade-machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any land on which they grow." And, by section 7, fixtures or growing

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crops are not to be deemed separately assigned or charged "by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person." And further, by the same section, the rule of construction so laid down is made retrospective (see *Ex parte Moore*, 14 Ch. D. 379). "Trade machinery" is defined by section 5 of the Act, and consists, generally speaking, of the machinery in a factory or workshop exclusive of the fixed motive powers and power machinery and pipes.

11. Under  
 Statute of  
 Frauds and  
 Stamp Acts.

11. *Questions whether a thing is land or an interest in land within the 4th section of the Statute of Frauds, or whether (as is often but not always the alternative) it is comprised in the category of "goods, wares, or merchandises" in the 17th section.*

I postpone consideration of this question until I come to consider the 17th section of the Statute of Frauds (Part IV. *post*). In the meantime I also observe that the words quoted from this section are also found in the Stamp Acts, which exempt from duty "an agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise" (33 & 34 Vict. c. 97, Schedule, "Agreement," 3rd exemption continuing the exemption made in former Acts); so that the same criterion is doubtless applicable to questions under these Acts.

PART II.  
THE PARTIES TO A SALE (WHEREIN OF OWNERSHIP  
AND DISPOSING POWER.)

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IN this part of the work I propose to treat of the parties to a sale, and under this head I shall consider in the *first* place the general capacity of persons to contract. *Secondly*, I shall consider who is able to dispose of the property in a thing. This leads to certain questions of competition in regard to the property, those namely which arise on executions and on bankruptcy, and these I shall consider, *thirdly*, in this part of the work, as I see no more appropriate place for them.

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§ 1.  
§ 1. General capacity.

SECTION I.—GENERAL CAPACITY.

The parties to a valid sale must be persons legally capable of contracting, and, therefore, speaking generally, do not include,

Persons generally incapable.

1. Alien enemies.
2. Convicts.
3. Infants.
4. Lunatics.
5. Married Women.

1. *Alien enemies.*

1. *Alien enemies*, that is to say, persons subject to a Sovereign actually at war with the Sovereign of this country are, on grounds of public policy, deemed incapable of contracting with British subjects, and *vice versa*.

1. Alien enemies.

2. *Convicts.*

2. Persons who are *convicts* within the meaning of 33 & 34 Vict. c. 23 (s. 6) are, by section 8 of the same statute, incapable of making any contract.

2. Convicts.

3. *Infants.*

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3. Infants.

3. With regard to *infants*, the general rule of the common law is that their contracts are voidable. That is to say, it is within the option of the infant to make void the contract and have matters restored to their original position, *if that is substantially practicable*. The condition just mentioned is, I apprehend, implied in every case where a contract or other transaction is said to be voidable. Where this condition is absent, the redress, if any, competent to the party who would otherwise be in a position to avoid the contract, must depend on whether the conduct of the other party amounted to a fraud, and his remedy (if any) consists merely in a personal action on a claim for damages against the person guilty of the fraud (*Addie v. Western Bank of Scotland*, L. R. 1 H. of L. Sc. 145, 160).

A *sale* of property by an infant is voidable at his option and to this there appears to be no exception.

A *purchase* by an infant, except of necessities, is similarly voidable at common law. But further, by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62, s. 1), all contracts with infants for goods supplied or to be supplied (other than contracts for necessities) are absolutely void, and (sect. 2) incapable of being ratified (*Ex parte Kibble, In re Onslow*, L. R. 10 Ch. 373). It has been held by the Court of Exchequer Chamber on appeal from the Court of Exchequer, notwithstanding the verdict of a British jury to the contrary, that *studs* or *solitaires* for fastening the wristbands of a shirt, at the price of £25, were *not* necessities for an infant, although on attaining majority he became entitled to £20,000, and evidence was given that he "moved in the best society" (*Ryder v. Wombwell*, L. R. 4 Ex. 32). If an infant is married, his obligations as husband and father in supplying necessities are the same as if he were of full age, and therefore a contract with him for supplying necessities to the wife and children is valid (*Benjamin on Sale*, p. 23; *Turner v. Frisby*, 1 Str. 168; *Rainsford v. Fenwick*, Carter, 215).

4. *Lunatics.*

## 4. Lunatics.

4. *Lunatics*, or *persons of unsound mind*, are very much in

the position of infants prior to the Act 37 & 38 Vict. c. 62. A sale or purchase made by a lunatic is voidable as soon as it is shown that at the time of making it the party did not know what he was doing, and that the transaction was to his disadvantage. This proposition seems in accordance with the general tenor of the authorities which are all cited in the arguments in *Molton v. Camroux* (2 Ex. 487; 4 Ex. 17), and is consistent with the decision in that case, which was to the effect that the transaction there in question could not be made void. The question had arisen after the death of a lunatic, who had purchased and fully enjoyed an annuity for his life. It was proved that the other contracting party was not aware of the lunatic's mental condition, and that no advantage was taken. It was not practicable to restore matters to their original position, and the facts showing that there was no fraud, there was no case for redress. (See also *Beavan v. McDonnell*, 9 Ex. 309, & 10 Ex. 184.) The case differs from that of an infant in this, that the incapacity is not always obvious to a stranger; and also that so long as he is not put under restraint, tradesmen may reasonably furnish him with things suitable to his condition in life, and, if they are actually enjoyed, recover the price of them (*Bagster (or Baxter) v. E. of Portsmouth*, 7 D. & R. 614; 5 B. & C. 170). It is not, as in the case of an infant, a question of necessities strictly so called.

The question of the nature and degree of lunacy to avoid a contract is much discussed in *Jenkins v. Morris*, 14 Ch. D. 674: and it was there decided by the Court of Appeal, that an insane delusion to avoid a contract must be such as to enter into the subject-matter of the contract, so that the person was incompetent to manage his affairs in respect of that very matter.

The indulgence given to lunatics has apparently been extended to persons who have been induced, when in a state of complete intoxication, to enter into contracts to their prejudice. The reason is that it is a fraud in the other party to take advantage of the drunkard's state; and the case is so put by Parke, B., in the case of *Gore v. Gibson*, 13 M. & W. 623. For drunkenness has never been admitted as an excuse for a *tort* or a *crime*, and there can be no better reason, *on the part of the drunkard*, for excusing him from a contract.

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§ 1.5. Married  
women :5. *Married Women.*

5. A *married woman*, speaking generally, cannot contract, and any contract which she may purport to make is absolutely void. It has been even held that a *feme covert*, living apart from her husband, and having a separate maintenance secured to her by deed, cannot contract or be sued as a *feme sole* (*Marshall v. Mary Rutton*, 8 T. R. 545).

Except,

The exceptions are:—

(a) when  
husband abroad,

(a) When her husband is an alien enemy and abroad (Lindley, p. 86; *Derry v. Mazarine*, Lord Raymond, 147).

(b) husband  
*civiliter mortuus*,

(b) When her husband is *civiliter mortuus*, which is now the same as to say that he is a *convict* within the meaning of 33 & 34 Vict. c. 23, s. 6.

(c) trading on  
her own account  
in City of  
London,

(c) When she is a sole trader within the City of London she is, by the custom of the city, capable of contracting and of suing and being sued in the city courts in matters arising out of her dealings in her trade in London (Benjamin, p. 29; *Beard v. Webb*, 2 B. & P. 93).

(d) contracting  
on the credit of  
separate estate,

(d) A married woman may by contract bind separate estate (as to which she is not restrained from anticipation, *Pike v. Fitzgibbon*, C. A. 1881), provided she intended to contract, and was understood by the other party to contract, not on behalf of her husband, but for herself, and on the credit of her separate estate. The intention so to contract need not be expressed, but may be inferred from the nature of the contract itself (*Mrs. Matthewman's case*, L. R. 3 Eq. 781; *London Chartered Bank v. Lemprière*, L. R. 4 P. C. Ap. 572, 594; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *Lancashire and Yorkshire Bank v. Tee*, Nov. 22, 1875, V. C. H., W. N. p. 213), and is readily inferred if the married woman is at the time living separate from her husband (*Picard v. Hine*, *supra*).

(e) By some modern statutes a married woman is enabled to contract under certain circumstances or for certain limited purposes. While judicially separated from her husband a married woman, by 20 & 21 Vict. c. 85, s. 25, is to be considered as a *feme sole* with respect to property of every description, which she may acquire or which may come to or devolve upon her, and (by sec. 26) is to be considered as a *feme sole* for the purposes of contract, and Wrongs and Injuries, and suing and being sued in every civil proceeding. She is in a similar position with respect to property and to contracts, and suing and being sued (*Ramsden v. Brearley*, L. R. 10 Q. B. 147), if she obtains an order of protection from a magistrate or judge, on the ground of her husband's desertion, under section 21 of the same statute (see also 21 & 22 Vict. c. 108, ss. 6—10). By section 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), a married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use. By the same Act, sec. 1, the wages and earnings of any married woman, acquired after the passing of the Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, and her receipts alone are declared to be a good discharge for such wages, earnings, money, and property; and by section 11 of the same Act a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property, by the Act declared to be her separate property, and it is further enacted that she shall have in her own name the same remedies, both civil and criminal,

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(e) when  
judicially  
separated.

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against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased by means thereof for her own use, as if such wages, earnings, money, chattels, and property, belonged to her as an unmarried woman. Under the two sections last mentioned, it has been decided that a married woman is entitled to maintain an action in her own name to recover damages against her bankers for dishonouring cheques drawn by her in the course of a trade which she carries on separately from her husband, or for not duly presenting or not giving due notice of dishonour of a bill of exchange acquired by her in such trade, and entrusted to them by her for presentment (*Summers v. City Bank*, L. R. 9 C. P. 580.)

Persons of  
limited capacity.  
Incorporated  
companies.

Besides the conditions of *incapacity* above mentioned, I must here advert to legal persons of *limited capacity*, namely, companies incorporated for particular purposes. It is a general principle that a corporation cannot possibly employ its funds for purposes not authorised by its constitution (Lindley, p. 87). And so, although a railway company may sell the rolling stock which they find it no longer convenient to use for the purpose of their traffic, it is not competent for a railway company to enter into the business of manufacturers of engines or rolling stock for sale; and on a motion before the Master of the Rolls (16 Dec., 1875), the London and North-Western Railway Company were restrained, on an information by the Attorney-General (on the relation of certain manufacturers), from manufacturing engines for sale. The Master of the Rolls (Jessel), in a subsequent case relating to the letting of rolling stock, carried the doctrine further than the majority in the Court of Appeal thought warranted, it being shown that the letting of the rolling stock was conducive to the profitable working of their line (*Att.-Gen. v. G. E. Ry. Co.*, 11 Ch. D. 449). But this does not interfere with the principle for which I have cited the case of the London and North-Western Company as



an authority. As the objects of a company incorporated by special Act are defined by the Act, so are the objects of a company formed under the Act of 1862 defined by its memorandum of association; the company is by its constitution incapable of acting outside the sphere of its memorandum of association, and no attempt at ratification, even by the whole body of the shareholders, can render such an act binding on the company (*Ashbury, &c., Co. v. Riche*, L. R. 7 H. L. Ap. 653). In the case, therefore, of a corporation (including a company incorporated, whether under a special or general Act), the ownership of goods does not *necessarily* imply a power to sell them. I shall revert to the subject of this limited capacity when treating, in a later part of this work, of the law of agency relating to corporations.

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## SECTION II.—WHO IS ENTITLED TO DISPOSE OF THE PROPERTY.

§ 2. Who is  
entitled to  
dispose of  
the property.

*Property defined.*

The primary end of sale is the transfer of property in the thing sold, and it is, therefore, essential to a valid sale that one of the parties, namely, the seller, should have power to dispose of the *property*.

Property, what.

And before going further it is necessary to state clearly what is meant by "property," when the transfer of property in a thing is spoken of. And it is here convenient to advert to the expressions "general property" and "special property," which are met with in the cases and books on the subject of sale.

"General property," "special property."

To shorten the task of definition in this place, I refer the reader to the analysis contained in the Student's Edition of Austin's Lectures on Jurisprudence (pp. 177, 387, &c.), and assume the principles of that analysis as understood.

Austin's definition is, in effect, this :—

*Dominion or property* is the right residing in a person called the *dominus* or *owner*, availing against other persons generally, to use or deal with the thing, the subject of the right, in a manner, and to an extent limited only by the general rules of law, and not by any particular right over the same subject residing in another.

Dominion or property in the larger sense.

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The right here spoken of as *property*, consists in fact of a great number of rights, and may be conceived of as a bundle of rights, each consisting in the right to deal with the subject in some *particular* manner, or to an extent circumscribed by a *definite* line. One (or more) of these particular rights, detached, as it were, from the bundle, and placed in the hands of one who is not the owner, has been called *jus in re aliend* (or, to use the short phrase of the Roman lawyers, *jus in re*); a right defined as follows:—

*Jus in re aliend.* Every *jus in re aliend* is a fraction or particle residing in one person, of *property* residing in another person (Student's Austin, p. 413).

Property in the narrower sense. "Special property" and "general property" are the corresponding terms in English law.

Now *dominium* (or *property*) and *jus in re aliend*, as thus defined, correspond to the terms "general property" and "special property" as used in the English cases relating to sale. "General property" denotes the *property* as above defined, and connotes the fact that some of the rights constituting the property in the larger sense of the term, have been detached from the bundle, and form *jus in re aliend* residing in one not the owner. Or it may be said that "general property" is the residuum of the property after detaching the *jus in re aliend*. "Special property" and "special interest" are phrases conveying the same notion as *jus in re aliend*; but are usually applied to the particular *species* of *jus in re aliend* called *lien* and *pledge*.'

I have no objection to the terms "general property" and "special property," nor do I intend throughout this part of my subject to employ instead the less familiar terms *dominium* and *jus in re aliend*, which, as Austin shows, are far from being themselves precise. The terms "general property" and "special property" are indeed very apt and fairly precise expressions, though I doubt whether their meaning is always correctly apprehended by many who use them as current coin. But inasmuch as the use of these terms has been confined to a very narrow circle of questions, I think it important to point out their correspondence with notions which pervade every civilized system of law, and with terms which classic usage and modern analysis have combined to stamp with a fixed value.

I observe that this identity of meaning between the phrase "special property" and the *jus in re* (that is, *jus in re aliend*) of the Roman lawyers, is pointed out by Mr. Justice Shee in his judgment in the case of *Donald v. Suckling*, L. R. 1 Q. B. 585, 595, 599.

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It would indeed (as I shall presently show) be no great violation of established language to apply the term "special property" to a *mortgage* of goods (even as the right is conceived of in English law) as well as to the species of rights called *lien* and *pledge*. And with a still more strict consistency of language, the term "special property" may be used to include the *species* of rights, which, as the direct descendants of the Roman *hypotheca*, are familiar to most European systems of law, and, through the practice of the Admiralty Courts, even to English law. A still better term, and one which I shall employ when convenient, to embrace all those various species of rights, is the Scotch term "right in security," and the only novelty in my use of this term will be its extension to include the peculiar conception of *mortgage* according to English law.

"Right in security," term of Scotch law.

I have hitherto not concerned myself with any question as to whether what I may call the *ultimate* purpose of the right, is for the benefit of the owner himself or of some other person or persons. In the latter case the owner may, as executor, administrator, or trustee, be accountable or under a duty to some other person or persons who have a right *in personam* against him. And I must now explain the extent to which the right of property may be modified, by the circumstance that the *ultimate purpose* of the owner's right is for the benefit of another.

"Legal" and "equitable" ownership.

According to the old distinction between *Law* and *Equity* the *property at law* and the *property in equity* might be in different persons; or one person (A.) might be the *legal*, and another (B.) the *equitable owner*. This was precisely the same thing as to say that the ultimate purpose of A.'s legal ownership was for the benefit of B., that ultimate purpose being capable of being enforced by a suit in Chancery by B. against A., or by an equitable defence available to B. against A., under the Common Law Procedure Act, 1854.

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In effect, the *dominus*, or *owner* (A.) is under a personal obligation to another (B.), to permit the latter (B.) to exercise, in whole or in part, the power of user and exclusion which the former (A.) is entitled to exercise against persons generally. And further, a third person (C.) having notice of B.'s right, cannot by any transaction with A. acquire a property in the thing without subjecting himself to the liability to give effect to B.'s right.

According to the system of *Law* as distinguished from *Equity*, A.'s *dominium* was complete. But this was a mere fiction, which became considerably modified in a Court of Equity. Even there, however, the *legal ownership* prevailed, unless the person relying upon it had purchased with knowledge of the equitable right.

The essential character of the rights remain unaffected by the Judicature Act, which abolished the distinction between law and equity as *procedure*, and it is often convenient to employ the terms *legal property* or *property at law*, as distinguished from *equitable rights*, to express the modified *dominium* which the terms historically signify. I shall use these terms accordingly; and here, once for all, state what I mean by them, as follows:—

LEGAL (as distinguished from EQUITABLE) property is the right residing in the DOMINUS (A.), modified by a personal right residing in another (B.), and is such that A. has the right of user and exclusion available against persons generally except B.; and has, moreover, independently of B., the power of alienation for value to any person not affected by knowledge of B.'s right.

*Persons invested with Disposing Power.*

Persons invested with disposing power.

Having indicated what is meant by property in my definition of sale, I next consider who are the persons having power to dispose of the property.

These persons are comprised in the following descriptions:—

1stly. The owner.

2ndly. Persons authorised or empowered by the mandate of, or other contract with the owner.

3rdly. Persons selling in *market overt*.

4thly. Persons in possession of current coin or having the actual possession and control of a negotiable instrument.

5thly. Persons selling under process of law.

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### 1. *The Owner.*

And *first*, the owner himself. Except in the cases of *general incapacity* and *limited capacity* above mentioned, so far as they relate to capacity to contract by way of sale, the owner or *dominus* (in the large sense above mentioned) has the power to dispose of the property.

1. *The owner.*

As a more convenient place may not occur, I may here advert to a class of questions arising between two persons (A. and B.), where by reason of some act or omission of B. the question is decided in A.'s favour, *as if* a third person (C.) had owned the chattel, though in truth he did not. These cases are referred to by Blackburn, under the proposition :—" *There may be property by estoppel.*"

"Property by estoppel."

This is only a particular case of the general principle of estoppel, which has been stated as follows :—"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things existing at the same time," (Lord Denman in *Picard v. Sears*, 6 A. & E. 474 ; Blackburn on Sale, p. 162). And the rule so laid down is afterwards corrected and explained by Baron Parke as follows :—"By the term '*wilfully*' in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly ; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from

Meaning and effect of estoppel.

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contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised" (*Freeman v. Cook*, 2 Ex. 654, referred to and approved in *Polak v. Everitt*, 1 Q. B. D. 673; and in *McKenzie v. British Linen Co.*, 6 App. Ca. 82, 101, 109).

Same principle known under the expressions "representation" or "holding out."

The principle of estoppel is identical with the rule as to "representation" or "holding out" which has been applied in numerous cases by Courts of Equity, as well as courts of law, and to which I shall at several points in the sequel have occasion to refer. It affords not only a good defence, but an active title to sue for damages, where a loss has been incurred as the proximate consequence of the act invited by the misrepresentation. In such a case the representation has been deemed, at law, equivalent to a contract of *warranty*, the consideration being the act done by the other at the *request* or *invitation* of the person making the representation. For instance, a person (A.), representing himself as agent for another (B.), makes a contract in writing with a third (C.), wherein A. is described as such agent, for an interest in land. C., not being able to obtain performance, institutes a suit in Chancery against B. for specific performance. A., although aware of the suit, does not disclose his want of authority, and it is not discovered by C. until costs have been incurred in the suit. In an action by C. against A., the latter was held liable in damages for the misrepresentation, including the costs of the Chancery suit (*Collen v. Wright*, 7 E. & B. 301; see also *Yeomans v. Williams*, L. R. 1 Eq. 184; *Ex parte Bolland*, *In re Dysart*, 9 Ch. D. 312). But the principle does not extend to a mere representation, made in good faith, and unaccompanied by an *invitation* to act. This was held to be the case where a Telegraph Company having made a mistake in conveying a message, was sued by the party who received the incorrect message and who had acted upon it. The mistake was in good faith. There was no *contract* between the Company

and the receiver of the message, nor any warranty by the former. What the receiver of the message did when he got it was obviously no concern of the Company, nor was there anything from which an *invitation* or *request* on their part to him so to act could be implied (*Dickson v. Reuter's Telegraph Co.*, 26 W. R. 23).

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The language held in Courts of Equity has been slightly different, but is in effect identical. It amounts to this:—"If a person, with the intention to influence the conduct of another, represents as existing a state of facts which he knows does not exist, or in the existence of which he has no reasonable ground for belief, and the other acts accordingly on the faith of the facts so represented, the former, as against the latter, cannot avail himself of the real state of facts, and is deemed to have warranted the truth of the facts as represented by him (*Burrows v. Lock*, 10 Ves. 470; *Rice v. Rice*, 2 Drew. 73; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, 385; *Hart v. Swaine*, L. R. 7 Ch. D. 42; *In re British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533; cf. *Shropshire Union Ry. Co.*, L. R. 7 H. L. 496, 509).

Mode in which  
same doctrine  
has been ex-  
pressed by  
Courts of Equity

The principle has been extended, in the case where a fraud has been committed by which one of two innocent persons must suffer, so as to visit upon one of them the consequences of mere negligence or misplaced confidence. It has been laid down that "where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud" (*Babcock v. Lawson*, 4 Q. B. D. 394, 400; *Matthews v. Discount Corporation*, L. R. 4 C. P. 228; *Hiort v. Bott*, L. R. 9 Ex. 86; Campbell on Negligence, 2nd ed., p. 128). In *Vickers v. Hertz* (L. R. 2 H. L. Ca. 115) Lord Hatherley says:—"If one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it." By a steady adherence to this principle the Scotch Courts have always maintained that security to mercantile dealings on the faith of apparent rights which the Legislature in England has gradually and with difficulty achieved under the series of Acts hereafter considered under the name of the Factors'

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Acts (see *Vickers v. Hertz, supra*; *Pochin v. Robinow*, Court of Session, 3rd series, vol. vii. p. 622).

A further illustration of the principle may be found in the rule of equity which has been established in the case of an undischarged bankrupt who has been allowed by the trustee to go on trading. If the assignees or trustee permit him to trade, and knowingly allow him to treat with new creditors who in ignorance of his circumstances deal with him upon the faith of his ability to contract—especially where he has changed his trade or the place of carrying it on—the new creditors have a right to be paid out of the newly acquired assets before the creditors under the first bankruptcy (*Engleback v. Nixon*, L. R. 10 C. P. 645, 655; *Troughton v. Gitley*, Amb. 629). The mere fact of the debtor going on trading is however not sufficient to raise the presumption of consent or knowledge on the part of the trustee (*Ex parte Ford, In re Caughey*, 1 Ch. D. 521).

As illustrations of “property by estoppel” Blackburn (pp. 163—166) cites the cases of *Stonard v. Dunkin* (2 Camp. 344; *Haves v. Watson* (2 B. & C. 540); and *Gosling v. Birnie* (7 Bing. 339). These are all cases of action of trover against warehousemen or wharfingers who had acknowledged themselves to hold goods on their premises for the plaintiffs; the plaintiffs in each case having paid money to the warehouseman, or to a third party with his knowledge, on the strength of the acknowledgment. He also mentions the case of *Gillett v. Hill* (2 C. & M. 536), where there was evidence by way of admission against the warehouseman, but which the author shows was not a case of true *estoppel*, as it does not appear that the plaintiff paid the vendor, or otherwise altered his position in consequence of the defendant’s acts.

“A warehouseman,” the learned author continues, “may make himself responsible to both parties: to one because he has rendered himself incapable of denying that the property belongs to that party, though in truth it does not: and to the other because the property is in truth his.” And this remark is illustrated by the case of *Batut v. Hartley* (L. R. 7 Q. B. 594), where the defendant, the proprietor of a sufferance wharf, was found liable to the plaintiff, the owner of the goods, although it was suggested, apparently with reason, that he might be liable



as bailee to another person. The defendant had in the first instance received the goods as bailee to L., subject to a stop order for the freight. He then transferred the goods into the name of M., to whom L. had indorsed the bill of lading. He subsequently, as he alleged, on M.'s request, transferred the goods to "warrants." A jury had found that the transaction between M. & L. was colourable, and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the goods. Accordingly it was held that M. had no better title than L., although there was nothing to show that the warrants were not held by a person who had *bond fide* given value, and who might have had an action against the wharfinger in which the latter might have been estopped from denying the holder's right.

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According to the view taken by the Court of Appeal in the case of *Attenborough v. St. Katherine Dock Co.*, 3 C. P. D. 450, the warehouseman in a case such as that referred to by Blackburn in the passage last cited is entitled to the benefit of the 12th section of the C. L. P. Act, 1860; and is allowed to interplead, so that the hardship which formerly existed in his case, and which is illustrated by the Chancery decision of *Crawshay v. Thornton*, 2 My. & Cr. 1, exists no longer.

It is on a principle of personal bar, analogous to the principle of estoppel, that the owner of goods by bringing an action of trover, or for the conversion of goods, and recovering damages which are paid, in effect divests himself of the property in favour of the person guilty of the act of conversion and his assignees (*Cooper v. Shepherd*, 3 C. B. 266; *Adams v. Boughton*, 2 Str. 1078). Whenever one person affects to sell the goods of another, the latter is not bound to follow his goods, but may elect to sue the seller for conversion of them (*Cochrane v. Rymell*, 27 W. R. 776). By doing so and recovering damages he will in effect confirm the title of the purchasers. The result will be the same if the action is that formerly called an action of detinue, or for wrongful detention of the chattel, and damages are recovered and paid as on estimation of the full value of the chattel. But the owner does not in either case, by merely recovering judgment for

Property arising  
from owner's  
election to sue  
for conversion.

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damages, lose his title to the property, if the judgment is not satisfied (*Brinsmead v. Harrison*, L. R. 6 C. P. 584 ; 7 C. P. 547, 554 ; *In re Ware, Ex parte Drake*, 25 W. R. 641).

2. *Persons authorised by the Owner.*

2. *Persons duly authorised by the owner to sell.* Secondly, persons duly authorised by the mandate or other contract with the owner to sell the goods. These include (a) Agents having authority to sell on behalf of the owner, (b) Persons holding security over the goods for debt, and authorised to sell for payment of the debt, (c) Persons combining both these characters.

(a) Special  
agents for sale.  
  
Brokers.

(a) Special<sup>1</sup> agents having authority to sell on behalf of the owner and authorised for that purpose only, are usually termed brokers. Their authority depends on the mandate under which they are employed, which may be *express* (whether given by writing or verbally) or *implied* from the usage of the particular market in which they deal. Their authority and functions will be treated in some detail in the portion of this work relating to Agency.

Master of ship  
under certain  
exceptional  
circumstances.

The master of a ship is, under ordinary circumstances, the agent of the shipowner, but under exceptional circumstances becomes invested with an implied authority on behalf of the owners of the cargo, extending in extreme cases to an authority to sell the goods.

The authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed ; and, consequently, to justify his thus dealing with the goods, he must establish (1) a necessity for the sale ; and (2) inability to communicate with the owner, and obtain his directions. Under these conditions and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him ; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in the strong act .

<sup>1</sup> For the distinction between General Agents and Special Agents, see the general principles of agency, part viii., *post*.

of selling the goods, where it is possible to communicate with the owner, with the reasonable expectation of ascertaining, in time to act upon them, his wishes in the matter (*The Australian Steam Navigation Co. v. Morse*, L. R. 4 P. C. 222; *Acatos v. Burns and another* (C. A.) 3 Ex. D. 282).

The case in the Privy Council above cited was that of a cargo of wool brought from the owner's farm in Australia, which was 250 miles from the nearest port, and shipped from the port of *Rockhampton* for *Sydney*, a further distance of about 900 miles, but with means of communication by telegraph between ports. The consignees were nineteen different persons in *Sydney*. The vessel, about 45 miles from the port of shipment, struck on a rock and filled. Most of the wool became saturated with sea water, and after being transhipped, was reported as in imminent danger of getting heated and spoiled. The master, acting on his own judgment, sold the wool, and it was held that he was justified in doing so. By the judgment of the Privy Council it was held that communication with the owner was, in the circumstances, impracticable. The owners themselves were out of reach of any communication, and to communicate with the consignees, even supposing them to have represented the owners for this purpose, would have involved an amount of consideration and trouble, inconsistent with the prompt action which the emergency required. In the case of *Acatos v. Burns*, on the other hand, the question arose out of the sale at an intermediate port of a quantity of maize which had been shipped in such a state as to be dangerous to the ship and cargo. The maize had been unshipped into lighters, but the jury found there was no urgent necessity for the sale, and the master might have communicated with the owner of the maize to ask him whether it should be sold or not. It was held accordingly by the Court of Appeal that the sale was wrongful.

A case which strongly illustrates the burden of proof laid upon the purchaser is *Atlantic Mutual Insurance Co. v. Huth*, 16 Ch. D. 474, where the ship was totally wrecked at a distance from port, and the master took upon himself to sell the wreck and cargo in a lump. He had made no attempt to get any persons to attempt to recover the cargo for salvage remuneration, which it was suggested, though hardly proved, that he might have

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done. The Court held that the purchasers must be treated as salvors.

(b) Persons  
holding security  
with power  
of sale.

(b) The securities over goods constituted by contract with the owner are commonly (in English law) classed under three heads, *Lien*, *Pledge*, *Mortgage*. A security of the kind belonging to the first of these three heads is, *properly* speaking, *jus in re aliend*, and the holder of it has a "special property" in the goods. In a mortgage, the *property* itself is in contemplation of law, transferred to the mortgagee; the right of the mortgagor being, strictly speaking, a mere *jus in personam* against him. Other varieties of *rights in security* over goods, familiar to most modern systems of law, though known to English law only through the practice of the Admiralty Court, are those derived from the Roman *hypotheca*, and termed *hypothèque*, *hypóthec* (in Scotch law), and hypothecation.

*Lien*.

*Lien*, properly so called, gives no authority to the holder to sell the goods, but merely to retain possession of them until the debt is paid, and the lien is destroyed if the person having it parts with the possession contrary to the terms of his contract.

*Pledge*.

*Pledge* or *pawn*, in English law, consists in a transfer of the possession of goods in security of a debt, with power of sale in case of default (*Donald v. Suckling*, L. R. 1 Q. B. 604). The pawnee has a special property in the thing pawned, but without divesting the original owner, who retains the general property. The consequence is that a purchaser from the pawnee gets a good title to the goods, if the power of sale is validly exercised, but if not, he has no better title than the pawnee. The *pawn* is not, like a *lien*, determined by the pawnee parting with the possession, and although so transferred, the pawnor is not entitled to possession without payment of the debt (*Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Ex. 299). The transferee has in fact something like a *lien*, with possibly a power to transfer his right such as it is.

I may here mention a case of a special contract in which something like the relation of pledgor and pledgee was constituted, but where the special property, such as it was, became

terminated so as in effect to defeat the security. The case I refer to is *Babcock v. Lawson*, 4 Q. B. D. 394; affirmed C. A. 5 Q. B. D. 284. The plaintiff made advances to D. & Sons on the security of certain flour warehoused in accordance with the following memorandum signed by D. & Sons: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt." The defendants made advances to D. & Co. in ignorance of this transaction, and D. & Co. by fraudulently representing that they had sold the flour to defendants, procured from the plaintiffs a delivery order which they gave to the defendants. The defendants on this order obtained possession of the flour, and, their advances not being repaid, sold it. It was held that (assuming that the plaintiffs had a special property constituted in them at the commencement) their intention in giving the delivery order must be taken to have been to revest the whole property in D. & Co., in order that they might transfer it to the defendants as purchasers; and that the title of the defendants as transferees *bond fide* and for valuable consideration, was accordingly indefeasible.

Although it is by English law essential to the constitution of a pledge that possession should be delivered to the pledgee, it has been held that a pledge may be good, although the actual custody was given back for a special purpose. Thus in *Reeves v. Capper*, 5 Bing. N. C. 136, where the master of a vessel pledged his chronometer with the owner of the vessel, stipulating that he should be allowed the use of it for the voyage, for which purpose it was handed back to him, the pledge was held good against a subsequent pledge made by the pledgor.

By a *mortgage* of goods, the owner is, in English law, conceived of as entirely divesting himself of the property, and reserving only a right of redemption, being a personal right against the mortgagor. The distinction in this respect between a mortgage and a pledge will be found stated in *Harris v. Birch* (9 M. & W. 591, 595) and *Franklin v. Neate* (13 M. & Mortgage.

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W. 481, 484). The entire property being so vested in the mortgagee, the power of sale (so as to give a title to the purchaser freed from any right of redemption which may subsist between the mortgagor and mortgagee) is vested in the mortgagee as an incident to the property and not, as in the case of pledge, by virtue of an express or implied mandate. A mortgage of chattels is usually made by an instrument under seal called a bill of sale. But it has been decided, on the authority of a passage in Coke, that a mortgage of chattels may, even at law, be made without delivery of possession and without deed (*Flory v. Denny*, 21 L. J. Ex. 223). It must be borne in mind that the title of a mortgagee of goods not clothed with actual possession is liable to be divested by the execution creditor or general assignee on behalf of creditors unless registered under the provisions of the Bills of Sale Act, 17 & 18 Vict. c. 36; and by the trustee in bankruptcy under the reputed ownership clause of the Bankruptcy Act, which will be fully considered in the sequel.

*Hypotheca.*

The *hypotheca* of the Roman Law, and its lineal descendants in modern systems, vary in some minor features, but have this general character in common. The right is a "right in security" or over the goods, not clothed with possession but giving the creditor a right to have the goods sold under judicial authority for payment of his debt.

A charge over goods which gives a right to a sale by order of a Court of Equity comes very near, in practical effect, to the Roman *hypotheca*. But the term *hypothecation* is applied, in English law, only to the security which is constituted under the maritime contracts of *bottomry* and *respondentia*; and it has been said that these contracts do not confer a *special property* on the creditor (Fisher on Mortgages, p. 5). This is of a piece with the distinction in the English books, particularly on the law of real property, between *property* and *powers*. It would be easy to show that the distinction has no essential significance. Every *power*, if vested in one who is not the absolute owner, and capable of exercise so as to destroy or diminish his rights, is *jus in re alienâ*. And as the term "special property" is of comparatively recent

invention, and of arbitrary application, I see no reason why it should not be applied to the powers of the creditor in a bottomry bond, as well as to those of the pawnee. But the use, in the sense before mentioned, of the term "right in security," avoids any verbal question.

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I must here note the species of right constituted by what is called an *equitable assignment*; being a right in security liable to be defeated only by a purchaser for value without notice who gets the legal title.

*Equitable assignment in security.*

An *equitable assignment* is effected, *first*, when one person, being in possession and the complete owner of goods according to the system formerly called *law* as distinguished from equity, has agreed for executed consideration (generally consisting of an advance of money by way of loan) that goods shall become the property (generally by way of security) of the other, or that they shall be *charged* with payment of the debt;<sup>1</sup> or, *secondly*, when he has agreed that the creditor shall have a charge on his goods in the hands of a bailee, who, on receiving notice of the charge, becomes a trustee of the possession for the creditor.

1st. Of goods in assignor's own possession.

2nd. Of goods in possession of a third person.

An *equitable assignment* of the first kind was established by the highest authority in the case of *Holroyd v. Marshall*, 10 H. L. C. 191. T., a manufacturer and owner of machinery at a mill, becoming embarrassed, a sale of his effects by auction took place, and H. purchased all the machinery at the mill. The machinery was not removed, and it was agreed that T. should buy it back for £5,000. An indenture was executed, to which T., H. and one B. were parties, whereby the machinery and premises therein specified were assigned to B. in trust for T. until demand, and then for T. absolutely if he paid the amount due, but in default to sell and apply the proceeds to pay off H.,

First kind of equitable assignment, *Holroyd v. Marshall*.

<sup>1</sup> It has been said that an instrument under seal charging goods with a debt, confers, even at law, a right to take possession of them as a security (*per Mellish, L.J.*, in *Edwards v. Edwards*, 2 Ch. D. 297). Where the goods are specifically

ascertained, and are in the assignor's possession, it is very difficult to draw the line, if there is any, between a legal and an equitable assignment of them. But the distinction is not frequently of practical importance.

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and to pay the surplus, if any, to T. The indenture further contained an agreement that all the machinery which, during the continuance of the security, should be fixed or placed in or about the mill should be subject to the same trusts, and that T., his executors, &c., would at all times during such continuance, at the request of H., his executors, &c., do all necessary acts for assuring such added or substituted machinery, so that the same might become vested accordingly. Subsequently to the execution of the indenture, T. purchased and placed in the mill additional machinery, and in a question between H. and an execution creditor it was held that the new machinery, as soon as placed in the mill, was brought under the operation of the agreement, and became in equity the property of H., in whose favour T. was bound to execute a legal assignment of the property, and for whom he was in the meantime a trustee.

*Why equitable?*

The reason why it was necessary, in the case of *Holroyd v. Marshall*, to call in the aid of *Equity*, was the technical one that property non existing, but to be acquired at a future time, is not assignable at law. Even at law, however, the legal title would have been complete in the assignee under the indenture, upon possession being taken by him of the goods (*Hope v. Hayley*, 5 E. & B. 830). It is not easy to define the extent to which "equity" has gone beyond "law" in allowing a special property or right in security to be created in goods remaining in possession of the person having the general property; but this at least may be laid down as established by the cases, that where there is a *bond fide* debt, and an agreement in writing by the debtor for an executed consideration, clearly expressing the present intention to set apart for securing the debt specified goods of the debtor, or goods of a specified class when acquired by him, a trust is created which equity will enforce, of all goods specifically ascertained as coming within the intention of the instrument.

A trust said to be created.

Such a trust established in *Ex parte Montague, In re O'Brien*,

A trust to this effect was established by decision of the Court of Appeal, under an agreement in writing not under seal, in the case of *Ex parte Montague, In re O'Brien* (1 Ch. D. 554). A debtor, on the eve of insolvency, being pressed by a creditor for payment, wrote to him as follows:—"Messrs.



S. M. & Co., Sirs,—In consideration of your delaying legal proceedings in respect of a returned bill of lire 7268, I hereby transfer to you 500 tons of coals which are on my wharf, the proceeds of which coals shall be handed to you till my debt to you is liquidated. I also engage to pay you £100 to-morrow; &c.” The point relied on by the creditor was that there had been a specific appropriation of the proceeds of the coals. Baggallay, L.J., in the course of the argument (24 W. R. 310) asked if the construction of the letter of 17th August was not that the debtor was thereby constituted a trustee of the coals to sell them for the benefit of Messrs. S. M. & Co., and this seems to have been the view of the document adopted by the Court. It was also held that by a true construction of the instrument it was the intention of the parties that the creditor should have a right to demand possession of the coals if he suspected the insolvency of the debtor, and such a demand having been made, they ceased to be in the reputed ownership of the debtor within the Bankruptcy Act. As another instance of an equitable assignment of this kind may perhaps be cited the case of *Tebb v. Hodge* (L. R. 5 C. P. 73), where the security consisted of a restaurant “as fitted and licensed.” It does not, however, clearly appear that any part of the security consisted of *mere chattels*. If it had (the transaction having been prior to the Bills of Sale Act, 1878) there would probably have been a reputed ownership in regard to such chattels.

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And perhaps in  
*Tebb v. Hodge*.

The application of the equitable principle laid down in *Holroyd v. Marshall* was carefully considered by the Court of Exchequer in *Belding v. Read* (1865, 3 H. & C. 955), where the question arose between the assignee in bankruptcy and the holder of a bill of sale by which the debtor assigned all his household furniture, plate, linen, &c., and *all other his personal estate and effects whatsoever* then being or thereafter to be upon or about his dwelling-house, farm, or premises at R., or elsewhere in Great Britain; and the property in dispute consisted of chattels which had been acquired by the debtor subsequently to the execution of the deed, and seized by the holder of the bill of sale, some of them upon the premises at R. and others not. It was held that none of this after acquired property could be retained under the security, and that the case could

No assignment  
where descrip-  
tion too vague,  
*Belding v. Read*

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not be brought within the equitable principle of *Holroyd v. Marshall*; on the ground, in effect, that the description was too vague and general. Mr. Baron Bramwell (3 H. & C. 964) in observing upon *Holroyd v. Marshall*, distinguishes as follows:—  
“There, machinery, which in a sense was not specific when the deed was executed, having become specific by being brought into a particular mill and made a part of its machinery, it was held that although the added machinery was not in existence when the deed was executed, a covenant or grant of this nature would confer an equitable interest in it. But here the property acquired after the bill of sale was executed has never become specific, so as to form the subject for a decree of specific performance.” And the opinions of Barons Martin and Channell put the distinction on the same ground.

Doctrine of  
*Holroyd v.*  
*Marshall*  
applied in  
*Leatham v.*  
*Amor*.

In the case of *Leatham v. Amor* (1878, 26 W. R. 739) the question came before the Court on interpleader, and the Court took time to consider whether the case was distinguishable from *Holroyd v. Marshall* so as to be under the operation of *Belding v. Read*. It arose out of a mortgage made by the purchaser to the vendor of a refinery, and the mortgage deed assigned the buildings, machinery, and chattels belonging to or used in connection with the refinery particularly described in a certain inventory, “*subject to the addition to and alterations and renewals of parts of the said machinery, chattels, and effects which have taken place since (a certain date) or which shall hereafter be in or upon the same premises.*” The chattels in question in the case were certain articles which the purchaser (the mortgagor) had placed upon the premises subsequently to the date mentioned, and the decision was, in effect, that the property had passed in equity to the assignee. Cockburn, C.J., says:—“We think that the assignment in the case before us is sufficiently specific, the machinery and chattels in question having become specific, to use the language of Mr. Baron Bramwell, by having been brought into the refinery, and made part of the machinery.” And Mr. Justice Manisty says:—“It is found as a fact in the special case, that the goods in question were upon and used in connection with the refinery when the sheriff seized them. I think, therefore, they were sufficiently

described and capable of being identified to have entitled the plaintiff to maintain an action for specific performance of the contract contained in the bill of sale, and that, consequently, the plaintiff was in equity the proprietor of them and entitled to priority over the defendants as execution creditors.

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In *Lazarus v. Andrade*, 5 C. P. D. 318, a question came, on interpleader, before Mr. Justice Lopez, arising out of a bill of sale by way of mortgage whereby the debtor had assigned to the plaintiff the stock-in-trade, chattels, goods, and effects in and upon certain premises according to particulars in a schedule, "and also the stock-in-trade, goods, chattels, and effects, which shall or may at any time or times during the continuance of this security be brought into the aforesaid messuage or dwelling-house, warehouse, and premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, goods, chattels, and effects now being therein, or any of them." Mr. Justice Lopez decided that certain stock-in-trade which subsequently to the date of the bill of sale had been brought on to the premises in addition to or substitution for that which was there at the date of the bill of sale, and which had been seized by the execution creditor, were the property of the plaintiff under the bill of sale. It may be observed that in this case the learned judge remarked, "*Belding v. Read* was decided before the Judicature Acts, and is distinguishable from the present case." No doubt it is fairly distinguishable, but I do not think it is a just observation on *Belding v. Read* to say that it was decided before the Judicature Acts. The form, indeed, of the action was trover by the assignee in bankruptcy, but the decision was on a special case in which the equitable title of the holder of the bill of sale according to the doctrine of *Holroyd v. Marshall* was fully argued and considered: and it was decided by a Court not unaccustomed (on interpleader and otherwise) to consider questions of equitable title, that the equitable doctrine of *Holroyd v. Marshall* did not apply.

Same doctrine applied to stock-in-trade, *Lazarus v. Andrade*.

As closely connected with the cases here discussed I may mention the case of *National Mercantile Bank v. Hampson*, 28 W. R. 424, in which it was decided that where an assignment was made in general terms of the growing crops, goods,

General assignment by way of security of stock-in-trade implies a licence to the assignor

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to sell in the  
way of trade.

chattels, and effects, which were then or should thereafter be upon a farm, there was an implied licence for the grantor to carry on his business as a farmer, and that any *bond fide* purchaser from him *in the course of that business* would have a good title. See also *Taylor v. M'Keand* (28 W. R. 628).

Instruments  
charging, in  
general language,  
the property of  
a company.

In connexion with the doctrine on which *Holroyd v. Marshall* is the leading authority, I must advert to a train of decisions relating to companies constituted under the general Companies Acts, and the instruments known as "bonds," "debentures," or "mortgage debentures," whereby they create or affect to create charges over something which is described as the "undertaking,"<sup>1</sup> or the "property," or the "property and effects" of the company.

The result of these decisions appears to be that, under appropriate powers in the articles of association, instruments of security called "debentures" or "mortgages" may be issued by a company charging, in general language, the "*property and effects*" (or the "*undertaking*,"<sup>1</sup>) of the company; to the effect that while the company, as a going concern, remains free to deal with its property in detail by way of sales, mortgages or otherwise in the course of its business, these instruments will, on the winding-up of the company, operate as securities, giving a preferential charge over the whole assets (or all the assets of a particular description determined by the scope of the company's business,) other than the uncalled capital, of the company, existing at the date of winding-up. The cases are *In re Marine Mansions Co.* (V.-C. Wood, 1867, L. R. 4 Eq. 401); *In re Panama, New Zealand, &c., Co.* (V.-C. Malins, affirmed by L. J. Gifford, 1870, L. R. 5 Ch. App. 318); *In re Sankey Brook Coal Co., No. 2* (V.-C. James, 1870, L. R. 10 Eq. 381); *Bloomer v. Union Coal and Iron Co.* (V.-C. Bacon, 1873, L. R. 16 Eq. 385); *General South Amer. Co.* (V.-C. Malins, 1876, 24 W. R. 547, 2 Ch. D. 337). The case was appealed, but the only point

Cases.

<sup>1</sup> It should be noted that the word "undertaking" in these instruments has received an entirely different construction from the "undertaking" in the mortgages

of a railway company constituted under special Acts for public purposes. See *Gardner v. London, Chatham, & Dover Ry. Co.*, L. R. 2 Ch. 201.

argued on the part of the appellants, was as to defective registration); *Norton v. Florence Land, &c., Co.* (M. R. Jessel, 1877, 7 Ch. D.) 332; *In re Florence Land, &c., Co., Ex parte Moor* (C. A., consisting of Jessel, M.R., James, L.J., and Thesiger, L.J., 10 Ch. D. 530; and see reference to the case in *More v. Anglo-Italian Bank*, 10 Ch. D. 687); *In re Hamilton's Ironworks, Ex parte Pitman and Edwards* (V.-C. M. 12 Ch. D. 707); *Hodson v. Tea Co.* (V.-C. Hall, 1880, 14 Ch. D. 859); *In re Colonial Trusts Corporation; Ex parte Bradshaw* (M. R. Jessel, 15 Ch. D. 465).

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*What assets* may be charged by such a security is left by the decisions a more open question. In the appeal of *Re Florence Land, &c., Co.*, which was very fully considered, the Master of the Rolls, in the course of the argument, puts questions suggesting a doubt whether the law could give effect to an intention to sweep into the security the whole after-acquired property of the company. The questions are—(10 Ch. D. 535) “Can a company, any more than an individual, charge its future property?” And, having regard to the 10th section of the Judicature Act, 1875, “Would it not be contrary to the Bankruptcy Laws that a mortgage security should not affect after-acquired property?” In his judgment, delivered in the case, he arrives, in common with the rest of the Court, at the conclusion that, having regard to the scope of the operations of the company as indicated by the articles, the property intended to be charged was sufficiently indicated; but he concludes by reverting to the difficulty as to the effect of the Judicature Act on these securities, and intimates that that question, as well as the question what property was intended to be charged is to be reserved. The order of the Court was ultimately settled so as to declare that the mortgage debentures were a charge on all the estate, property, and effects of the company comprised in the mortgage debentures, but the declaration was without prejudice to any question as to what estate, property, and effects were comprised in the mortgage debentures, and without prejudice to any question of priority as between the holders of such mortgage debentures and the other mortgages, if any, of the company. The difficulties above referred to are not adverted to in the de-

*What assets*  
are charged by  
such a security  
an open ques-  
tion, *Re*  
*Florence Land,*  
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cision of the Master of the Rolls, in the later case of *Re Colonial Trusts Corporation, Ex parte Bradshaw*, 15 Ch. D. 465; so that he must have come to the conclusion that the Bankruptcy laws do not apply to companies in regard to charges of this kind.

Equitable assignment of chattels in contracts for building or works connected with land.

Another species of equitable assignment, in which the goods remain in the possession of the assignor, is in contracts for building or other works connected with land, where the proprietor makes payments to the contractor during the progress of the work, and for his own protection stipulates that materials, &c., brought on the premises, or otherwise destined for the construction, shall be considered his property. In *Brown v. Bateman* (L. R. 2 C. P. 272), the stipulation was that all materials brought on the premises should be considered as immediately attached to and belonging to the premises; and it was decided by the Court of Common Pleas that this clause gave the landowner an equitable interest in the materials brought on the land during the progress of the work. The stipulations here observed upon are similar in their object and purport to those usually contained in shipbuilding contracts, which will be considered in another place (p. 273, *post*). But as in those cases the contract is merely an executory contract for sale of a chattel, there was never any question of calling in the aid of equity; the legal property vesting according to the intention of the contract, provided the subject matter is specifically ascertained.

Second kind of equitable assignment. Goods in possession of third person.

*Secondly.* An equitable assignment may be also effected by the owner of goods in the hands of a bailee, specifically appropriating them, or agreeing with his creditor that they shall be specifically appropriated or charged for the payment of the debt. It is not necessary that the agreement for this purpose should be in writing. The assignment is completed by notice to the person having the custody of the goods, who, on receiving such notice, at once becomes a trustee of the possession for the creditor. Of this kind of assignment the case of *Ranken v. Alfaro*, 5 Ch. D. 786, is, I think, an instance; although the facts are somewhat complicated by the circumstance that there

was a mandate by the owner (which was acted on) to a second agent or factor to get the goods out of the hands of the original consignee in order to apply them for the payment of certain bills. This, having been communicated to the holders of the bills, was held to amount to an equitable assignment of the goods for that purpose. A variety of this species of assignment is furnished by the facts of the case of *Gurnell v. Gardnor*, 9 Jur. N. S. 1220, if the principle on which V.-C. Stuart appears to have decided the case is correct. The facts were that J. G., being indebted to the plaintiff in £218, said to the plaintiff, for the purpose of securing to the plaintiff the payment of such debt, and with the intention (according to the plaintiff's statement on oath, which was corroborated by the surrounding circumstances) of vesting the wool in the plaintiff:—"There is that wool which has gone to Doncaster, go and sell that wool, pay B. the balance due to him on such wool and keep the remainder yourself." J. G. died the same evening, the 2nd of August. On the 4th, the plaintiff went to Doncaster, and ultimately got possession of the wool and sold it. The executor brought an action for conversion of the wool, and a suit was brought in Chancery to restrain this action. Vice-Chancellor Stuart held that the transaction amounted to an equitable assignment, and that the plaintiff was entitled to keep the balance of the proceeds after paying B.; but he refused the plaintiff his costs on the ground that he had taken possession in a somewhat high-handed way. The plaintiff in equity, had doubtless been advised that he had no defence at law. I see, however, no reason why he should not, on proof of the facts as above stated, have succeeded in defending the action at law. The mandate to the creditor, being a *mandatum in rem suam* and for good consideration, was, I apprehend, not revoked by the death; and the possession taken by the creditor with lawful authority, completed his title to the special property as a factor with power to sell.

Where there is a *merely* equitable assignment, the right of the assignee, like any other equitable right, is not available against a purchaser for value whose conscience (to use the old phrase) is not affected by notice of the assignment. The

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assignee's right is, however, apart from the provisions of the Bills of Sale Act and questions of reputed ownership, available against the execution creditor and the trustee in bankruptcy who, generally speaking, take the rights of the debtor and nothing more.

But an instrument relied on by the creditor as an equitable assignment will be ineffectual against the execution creditor or trustee in bankruptcy, unless duly registered under the provisions of the Bills of Sale Act (*Ex parte Mackay*, L. R. 8 Ch. 648; *Edwards v. Edwards*, L. R. 2 Ch. D. 291; 41 & 42 Vict. c. 31, s. 4). And it is also ineffectual, in competition with the trustee in bankruptcy under the reputed ownership clause, if the creditor, being in a position to require possession, refrains from doing so. But it is otherwise if the debtor has kept possession in spite of a demand or attempt to take possession by the creditor (*Ex parte N. W. Bank, In re Slee*, L. R. 15 Eq. 69, 73; *Ex parte Montague, In re O'Brien*, L. R. 1 Ch. D. 554).

Agreement to  
assign upon  
request.

I here note the distinction between an equitable assignment and a bare agreement to execute an assignment upon request. There is a dictum of Lord Justice Mellish, to the effect that a covenant to assign goods when required, gives an equitable title to them (*Edwards v. Edwards*, 2 Ch. D. 297). But I am not aware of any decision giving this effect to these words standing alone. The effect of the words "*upon request*" in an agreement to assign (*upon request*) a contract for the purchase of *leasehold property*, was very fully considered in the House of Lords in the case of *Shaw v. Foster*, L. R. 5 H. L. 321. It was decided that the legal owner was not in any way affected by notice of such an agreement being made: nor could he have been bound to regard such notice, unless there had been a request, and notice of the request, as well as of the original agreement, had been given him. The words "*upon request*" were regarded as words of substance (among other reasons), because the creditors, who were bankers, might have hesitated to take the contract, which was an onerous one. I do not see why, in an agreement to assign *goods* "*upon request*," these words should be less to be regarded as words of substance.



The intention may be, and probably is, to leave the power of disposition in the owner unfettered, until some change of circumstances arises. And, previously to the Bills of Sale Act, 1875, an agreement of this nature, if not relied on as an equitable assignment, had certain important effects. The subsequent assignment by the debtor at the creditor's request was good, although executed on the eve of bankruptcy. It was not necessarily a fraudulent preference, and the former Bills of Sale Act was complied with if the assignment was registered within twenty-one days of its own date, and without reference to the date of the agreement (*Ex parte Homan, Re Broadbent*, L. R. 12 Eq. 598; *Ex parte King, Re King*, 24 W. R. 559). The shortening, by the new Act, of the period of twenty-one days to seven, and the advantages given by the new Act to immediate registration will probably render the agreement to assign "upon request" a less popular security than formerly.

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(c) I next consider the case of persons holding the double character of agents authorized by the owner to sell for him, and of creditors holding security, and entitled to sell for their own payment.

(c) Persons combining the character of agent with that of secured creditor having power of sale. Mandate with possession.

This combined character may be constituted by special contract; and the contract, being in the nature of a mandate, need not be in writing.

Where a company is wound up voluntarily under the Companies Act, 1862, the effect of the resolution confirming the appointment of the liquidators is, by the aid of the Statute (sec. 133, sub-secs. (1), (2), (7), and (10), and sec. 95; Buckley, p. 227), to give the liquidators a mandate to take and sell the goods and distribute the proceeds of them, and the other property of the company, in satisfaction of the liabilities *pari passu*, and subject thereto, amongst the members according to their rights and interests in the company. Where there is a compulsory winding up (a case to which I shall revert, p. 75, *post*), a similar authority is given to the liquidators, to be exercised with the sanction of the Court (secs. 94, 95). There is no provision in these Acts vesting the *property* of the company in the liquidators. But I think the effect, so far as relates to the goods, is to give the liquidator, on taking

Liquidator in voluntary winding up.

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possession, a right in the nature of a special property for the purposes prescribed by the Act.

Most frequently, however, the authority of the person having the double character now under consideration is constituted by contract implied from a cause of dealing. This is the case of the general mercantile agent having power to sell, who is, in English law, termed a factor.

Factors.

A factor, in regard to advances made by him on behalf of his principal, whether by payment of money or pledging his own credit, is in the position of a pledgee of the goods of the principal in his possession or control, with this difference, that there is here no question of default (*Donald v. Suckling*, L. R. 1 Q. B. 585, 596; Story on Bailments, pp. 325, 327). The authority given to the factor in the case of a consignment of goods for sale in the ordinary course of mercantile business, must necessarily relate to his own interest as well as to that of the consignor; and the factor must therefore, as a general rule and to an extent sufficient for his own security, be entitled to treat the authority to sell as *mandatum in rem suam*, and irrevocable. It has been indeed held, on demurrer, that the interest of a factor, acquired by advances made subsequently to the goods having been placed in his hands for sale, did not raise a consideration in his favour to prevent the recall of the mandate (*Raleigh v. Atkinson*, 6 M. & W. 676; *Smart v. Saunders*, 5 C. B. 895). But the decisions here cited do not in any way apply to the ordinary case where advances have been obtained on the factor's credit pledged by him on the faith of goods from time to time consigned to him for sale. It seems clear that in such a case the factor's authority to sell could not be recalled against his will, except on the terms of placing him in funds to meet all advances made, and liabilities incurred by him, in respect of all consignments made in that course of dealing.

In the part of this work relating to agency (see part viii., *post*), I shall describe more at length the nature and effects of the authority (actual and presumed) conferred upon factors, both by common law and by the statutes known as the Factors' Acts. Briefly stated, the distinguishing mark of a factor is that the goods which he is empowered to sell are placed at his

disposal either by actual possession or by means of the documents which, in a mercantile sense, are said to represent the goods; and the effect of the common law doctrine of *holding out*, as extended by the Factors' Acts, is that the purchaser may generally rely upon such ostensible control as implying a title to sell. The last of the Factors' Acts, that of 1877 (40 & 41 Vict. c. 39), greatly extends the circumstances upon which this reliance may be placed, so as to embrace almost every situation in which any person in the ordinary course of mercantile business is likely to have such control committed to or left in his hands. The statutes, however, stop short of conferring upon what are called the "documents of title," *e.g.*, warrants and bills of lading, a privilege in the nature of negociability.

### 3. *Persons Selling in Market Overt.*

*Thirdly.* Where goods are sold and bought *in market overt*, the purchaser has, by the common law of England, a good title to them, although the seller was not the owner, nor authorized by the owner to sell them.

3. Persons  
selling in  
market overt.

The conditions under which a sale is, at common law, recognised as being *in market overt*, are laid down by Coke, 2 Inst. 713. The sale does not bind the king for any of his goods sold in market overt: the purchaser must be without notice that the seller is in wrongful possession: the contract must be wholly made in the market overt, and not begun elsewhere and completed in the market.

Market overt in the country is held only on the special days provided for particular towns by charter or prescription, and is confined to the market place or spot of ground set apart by custom for the sale of particular goods. 2 Blackstone, 449. "In London" (*i.e.*, the City of London, *Lee v. Bayes*, 18 C. B. 599, 601) "every shop is market overt for such things only which by the trade of the owner are put there to sale," Coke, Rep. 83 *b*. That is to say the protection applies only to the sale of goods of the class which the owner of the shop professes to trade in, and which are openly exposed for sale in his shop and openly sold there (2 Blackstone, 449; *Crane v. London Dock Co.*, 5

B. & S. 313, 319). The protection does not apply to a sale from a *wharf* (*Williamson v. King*, 2 Camp. 335).

By a statute, 21 H. 8, c. 11, which appears to have extended an exception to the principle of *market overt* existing at common law (Coke, 2 Inst. 714), a privilege was given to the owner who prosecuted to conviction the felonious taker of goods. This statute is substantially embodied in the 57th section of the Larceny Act, 7 & 8 Geo. IV. c. 29, which again is re-enacted by 24 & 25 Vict. c. 96, s. 100. By these Acts the property is to be restored to the owner on such conviction, and the Court before whom the thief is tried may award a writ of restitution or make a summary order for restitution of the property. It has been held that whether such award or order be made or not, the property reverts in the owner on conviction (*Scattergood v. Sylvester*, 15 Q. B. 506). This, however, is not necessarily the case in regard to goods obtained by false pretences, although the language of the statute, s. 100, with regard to them is the same. Where goods are delivered under a contract induced by fraud, the property passes, liable only to be divested by some act rescinding the contract. If the person who has committed the fraud sells to another, before his own title has been annulled by such act of rescission, the purchaser, if in *bond fide*, acquires a good title. The Act does not apply so as to divest him of the property (*Lindsay v. Cundy*, 1 Q. B. D. 348; 3 App. Ca. 459; *Moyce v. Newington*, 4 Q. B. D. 32).

These statutes do not entitle the owner to recover the value of the goods from one who purchased in *market overt* but sold them in *market overt* before the conviction (*Horwood v. Smith*, 2 T. R. 750). But a purchaser *not in market overt*, selling the goods, whether in *market overt* or not, *after notice* of the owner's title, will be liable to him (*Peer v. Humphrey*, 2 A. & E. 485).

The privilege of *market overt* is therefore subject to the limitation of the above statutes, but by an express proviso in the later statute, giving effect to the settled rule of the law merchant, the *bond fide* transferee for value of a negotiable instrument is exempted from being obliged to restore the property to the owner (24 & 25 Vict. c. 96, s. 100). There are special provisions as to the privilege of *market overt* in regard to the

sale of horses by the statutes 2 & 3 Ph. & M. c. 7 (1555) and 31 Eliz. c. 12 (1589) Benjamin on Sales, 2nd ed. p. 10.

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When goods are stolen, the civil wrong done to the owner by the thief or one in league with him was at one time said to merge in the crime, but this doctrine has been modified by later decisions, and the theory, according to the more modern authorities, is that there is a personal bar to the civil action (on grounds of public policy) while the plaintiff is in default in regard to his duty to prosecute criminally. So that the fact of a felony having been committed does not prevent the owner from recovering from a third party in possession of the goods and innocent of the crime, although no step has been taken to prosecute the thief; nor does the bar remain after the offender has been brought to justice by somebody else (*White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599; *March v. Keating*, 1 Bing. N. C. 198; *Ex parte Bull*, *In re Sheppard*, 10 Ch. D. 667; *Midland Insurance Co. v. Smith*, 6 Q. B. D. 561).

#### 4. *The Holder of a Negotiable Instrument.*

*Fourthly.* It is of the essence of all civilized commerce that the property in *current coin* passes by delivery, and that the actual possessor of the coin, even if he has stolen it, can by delivery confer a good title upon another who receives it honestly.

4. The holder of a negotiable instrument.

There are also certain instruments which, by a usage having the force of law, impart to the holder, although not the owner nor authorized by him, the power (by delivery and by compliance with the other conditions, if any, prescribed by the tenor of the instrument and sanctioned by the usage) to transfer the property for valuable consideration to a purchaser who is not proved to have been in *mala fide* at the time the transfer was completed (*Whistler v. Forster*, 32 L. J. C. P. 161). These instruments, being invested with this character in order to *facilitate business*, are said to be *negotiable*; and the holder of such an instrument, transferring the same in the manner pointed out by its tenor and by the usage, can effectually sell and convey the right represented by the instrument, whether that be a right of property in goods, or any other right.

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It is here to be noted that where a negotiable instrument is dealt with according to its tenor and to the usage, so as to transfer the right represented by the instrument, the property in the instrument itself as an accessory to the right is transferred likewise. But the instrument itself, at least when negotiable by delivery, becomes of such paramount importance as to be something more than a mere accessory to the right represented by the instrument. And therefore bank notes, bonds, and coupons of foreign governments payable to bearer, exchequer bills, &c., though in their inception and nature the mere instruments and evidences of rights of action, acquire a substance and value of their own; and, except as far as they are considered and treated as current money, are "goods" to all intents and purposes.

Negotiable  
instruments  
enumerated.

Instruments of the following descriptions have been held to be negotiable, and are now recognised as such without requiring any further proof of the usage:—namely, bank notes (*Miller v. Race*, 1 Sm. L. Ca. 468); bills of exchange,<sup>1</sup> during currency and previous to maturity (*Lawson v. Weston*, 4 Esp. 56; *Grant v. Vaughan*, 3 Burr. 1516; *Collins v. Martin*, 1 B. & P. 648; *Peacock v. Rhodes*, Dougl. 636), and unless specially indorsed (*Archer v. Bank of England*, Dougl. 639; *Sigourney v. Lloyd*, 8 B. & C. 622, 5 Bing. 525); cheques on bankers, which have been described as inland bills of exchange, payable on demand (*Grant v. Vaughan*, 3 Burr. 1516; *Keene v. Beard*, 8 C. B. N. S. 372; *Whistler v. Foster*, 32 L. J. C. P. 161; *Watson v. Russell*, 34 L. J. Q. B. 93); promissory notes, by Statute, 12 Geo. III. c. 72, s. 30 (*McLae v. Sutherland*, 3 E. & B. 1); East India bonds, by statute (10 June, 1811), 51 Geo. III. c. 64, s. 4; Exchequer bills (*Brandao v. Barnett*, 1 M. & Gr. 909, 935; 6 M. & Gr. 630, 637, and 12 Cl. & Fin. 787; *Wookey v. Pole*, 4 B. & A. 1). Bonds of a foreign government, which are negoti-

<sup>1</sup> As a means of giving full effect to the negotiability of bills of exchange, it has been decided that where a bill has been accepted in blank for the purpose of being negotiable, it is immaterial, as against a *bona fide* holder for value,

to show that the drawing or indorsement is in a fictitious name (*Cooper v. Mayer*, 10 B. & C. 468), or is even a forgery (*London and South Western Bank v. Wentworth*, 5 Ex. D. 107).

able by the usage of the country to which they belong, are deemed negotiable by the law of this country (*Lang v. Smith*, 7 Bing. 284; *Att.-Gen. v. Bonwens*, 4 M. & W. 171). And the circumstance that they are accustomed to be dealt with in this country as transferable by delivery, provided that such course of dealing is consistent with the tenor of the instrument, is *prima facie* evidence that they are negotiable by usage in their own country (*Gorgier v. Melville*, 3 B. & C. 45). Scrip of a foreign government issued by its agents in England and entitling the bearer to receive a bond of such government on payment of all instalments due, and which are, by custom of the markets where they are dealt in, transferable by delivery, are negotiable (*Goodwin v. Robarts*, 1 App. Ca. 476). And upon evidence of mercantile usage, scrip certificates entitling the bearer to be registered as the holder of shares in a joint-stock bank upon making certain payments, have been held by the Queen's Bench Division to be negotiable (*Rumball v. Metropolitan Bank*, 2 Q. B. D. 194).

By way of contrast I here mention some cases in which the attempt to set up negotiability failed. There are *Glyn v. Baker*, (1811) 13 East, 509, as to East India bonds, *before* the statute of 51 Geo. III. (*Taylor v. Trueman*, 1 Mood. & Mal. 453); as to East India warrants, *i.e.*, warrants for goods bought from the East India Company (see also *Taylor v. Kymer*, 3 B. & Ad. 321, 327); *Partridge v. Bank of England*, 9 Q. B. 396); as to warrants for payment of dividends at the bank, where the allegation that they were negotiable "according to the usage and custom of bankers and merchants used and approved in London, for divers, to wit, sixty years," was held to be not an allegation of a good *general* usage; and lastly, the well known Scotch case of *Dixon v. Bovill*, 3 Macq. 1; in regard to certain instruments called "iron scrip notes" (see p. 95, *post*).

It would be beyond the scope of the present account of negotiable instruments to attempt to describe the circumstances which afford evidence of *mala fides* in the purchaser so as to disentitle him from claiming the property in a negotiable instrument. *Mala fides* must, however, be proved in fact, and the circumstance of what has been called "gross negligence"

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is only material in so far as it is evidence of *mala fides* (*Goodman v. Harvey*, 4 A. & E. 870).

Effect of crossing a cheque.

Crossing a cheque, which by usage and by 21 & 22 Vict. c. 79, operates as a direction to the banker on whom it is drawn not to pay the cheque except to the banker named in the crossing, does not destroy the negociability of the cheque (*Smith v. Union Bank of London*, L. R. 10 Q. B. 291); but the crossing may be material as evidence in a question whether the holder is in *mala fide* (*Carlow v. Ireland*, 5 E. & B. 765). The law upon crossed cheques has been modified, and the power of "crossing" extended to any holder by the Act 39 & 40 Vict. c. 81, and by that Act any holder of the cheque by adding to the "crossing" the words "not negotiable" may destroy the negociability of the cheque in regard to all subsequent holders.

If a cheque payable to *order* has been lost without indorsement by the true owner, no title can (generally speaking) be made to it by means of a forged indorsement. If the cheque is payable *on demand*, the banker on whom it is drawn is protected in paying it, by sec. 19 of the Statute 16 & 17 Vict. c. 59. That protection, however, does not extend to any other banker or person paying it (*Ogden v. Benas*, L. R. 9 C. P. 513; *Bobbett v. Pinkett*, 24 W. R. 711).

Rights of holder to sue in his own name (according to procedure before November, 1875) an invariable characteristic of a negotiable instrument of debt.

Where the right represented by a negotiable instrument is a simple right of action for debt, the instrument is always distinguished by this characteristic effect. The transferee, according to the tenor of the instrument and to the usage was entitled, according to the procedure in force before 1st Nov. 1875 (when the Judicature Act of 1874 came into operation), to enforce the right *by an action at law in his own name against the original obligee*.

The rule just adverted to has been supposed to be founded on public policy (*Dixon v. Bovill*, 3 Macq. p. 1, 14); and it is quite unbending. And therefore the question whether the transfer of an instrument according to its tenor and to the usage gave the transferee, according to the old system of procedure, the right to sue in his own name upon the contract



contained in it, is an infallible negative test of the negociability of the instrument.

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Now, according to the procedure in use before 1st Nov., 1875, it was held to be an established principle of law that, except by a *general* usage of trade so established as to have become part of the law-merchant, or by statute, no person could by a written engagement give a floating right of action at the suit of any person into whose hands the writing might come. The mere intention of parties to a contract could not impart this character to any instrument in which they chose to embody that intention ; and consequently a particular usage amongst a limited class of traders, which is merely evidence of the unexpressed intention of contracting parties, is quite irrelevant in a question whether or not an instrument is *negotiable*. *Those instruments only are negotiable which are so by general usage of merchants, or by statute* (*Glyn v. Baker, Partridge v. Bank of England, Dixon v. Bovill, supra; Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374, 381).

But there are cases in which a voluntary engagement between parties, by which they stipulate that an instrument made by them, which is not negotiable by any statute or general usage of trade, shall be transferable to bearer, or shall confer upon the holder some privilege independently of the rights of the original contractee, has *apparently* been given effect to. In all these cases, however, it will be found, on examination, that the transferee has succeeded in his claim, not *by reason of any quality in the instrument* giving him a title independently of the cedent, but because the circumstances establish a privity of legal relation between the original contractor and the transferee, whereby the latter practically stands in a better position than his cedent.

Apparent exceptions.

Explained on the doctrine of estoppel or representation establishing a privity of legal relation.

For the sake of clearness, and in order to keep in view the criterion as to the legal right of action above adverted to, I shall imagine the procedure before the Judicature Act to be in force. Suppose the original contract to have bound A. to B., and C. is the transferee of the obligation, C., in the name of B., sues A. at law ; or C., in his own name, sues A. in equity. The defendant

The principle of the cases analysed.

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A. sets up some equitable defence good against B., and therefore generally good against an assignee of B. It would be a good answer by C. to say that A. had, with a view to induce persons to become assignees of such instruments, *represented* that there were no such equities, and that he (C.) was induced to take the instrument and give value for it on the faith of that representation. That would amount to an estoppel at law, and a good defence on the ground of representation in equity. In the judgment of the Queen's Bench in *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374, delivered by Blackburn, this is suggested as the true *ratio decidendi* of the following cases :—*Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387 ; *Re Blakely Ordnance Co., Ex parte N. Z. Banking Corporation*, L. R. 3 Ch. 154, as contrasted with *In re Natal Investment Co., Claim of the Financial Corporation*, L. R. 3 Ch. 355 ; *In re General Estate Co., Ex parte City Bank*, L. R. 3 Ch. 758 ; and *In re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478.

The reasons, indeed, which are given in these last and some other judgments, and particularly in some of the cases in Chancery, lend some countenance to the doctrine that a person, and particularly a company thereto expressly authorized by its articles of association, may, by contract with another, issue an instrument which shall be practically negotiable. See *Re Blakely Ordnance Co., Ex parte N. Z. Banking Corporation*, L. R. 3 Ch. 154, *per* Sir J. Rolt, pp. 158, 160 ; and the decision of V.-C. Malins in *Re Imperial Co. of Marseilles, Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478, to which he adheres in *Re Hercules Insurance Co., Brunton's claim*, L. R. 19 Eq. 302, 315. But the case of *Crouch v. Credit Foncier of England*, in which the instrument in question *had been stolen*, furnished the *elenchus*, and the judgment delivered by Blackburn clearly demonstrates that for the transferee of such an instrument to maintain an action, it is necessary to establish *privity* with the original contractor. Whether (according to the judgment of Sir J. Rolt in *Re Blakely Ordnance Co.*, and of V.-C. Malins in *Re Imperial Land Co. of Marseilles*, against which may be set off the doubt of V.-C. Wood in *Aslatt v. Farquhar*, 10 W. R. 458) such *privity* can be established by

virtue of an antecedent promise by the contractor that he will not, against an assignee, by indorsement or delivery, avail himself of any equities he may have against the original contractee; or whether (as appears to be the view of the Queen's Bench in the judgment delivered by Mr. Justice Blackburn in *Crouch v. Credit Foncier of England*) such privity can only be established through a *representation* by the original contractor on the face of the instrument, that there are no equities or rights of set-off affecting the obligation expressed therein, seems a point still open. The latter I think, on principle, the sounder view.

The principle established by the Chancery cases, above referred to, amounts really to this, and no more:—*Where an instrument is issued by the original obligee for the purpose, appearing on the face of the instrument* (and sanctioned in the case of a company by the constitution of the company), *of being employed by the creditor to raise money by means of it, and the latter does so employ it, and a third person advances money on the faith of and according to the terms of the instrument without notice of any equity or right of set-off between the original parties, a privity is established between the original obligee and such third person, who may accordingly sue such obligee without being affected by such equity or set-off.* In support of this proposition, I refer, besides the cases mentioned on the three preceding pages, to the following:—*Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (L. R. 2 Ch. 391); *Graham v. Johnson* (L. R. 8 Eq. 36); *Re South Blackport Co., Ex parte James* (L. R. 8 Eq. 225); *Dickson v. Swansea, &c., Ry. Co.* (L. R. 4 Q. B. 44); *In re Northern Assam Tea Co., Ex parte Universal Life Assurance Co.* (L. R. 10 Eq. 458, a case arising out of the same transactions as the case of *Higgs v. Assam Tea Co.*, already referred to); *Webb v. Herne Bay Commissioners* (L. R. 5 Q. B. 642); *Goodwin v. Robarts* (1 App. Ca. 476, *per* Lord Cairns, p. 490); *Rumball v. Metropolitan Bank* (2 Q. B. D. 194). Subject to an observation, I may also cite, as authorities for the proposition that a person or company may be estopped by a statement on a document intended to be circulated as an instrument of credit, the cases of *Re Bahia and San Francisco*

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*Ry. Co.* (L. R. 3 Q. B. 585), and *Hart v. Frontino, &c.* (L. R. 5 Ex. 111). The observation is that these cases are overruled by the House of Lords (*Reg. v. Shropshire Union Ry. Co.*, L. R. 7 H. L. 496), in so far as they are authorities for the proposition that the ordinary share certificates issued by a railway company represent that the party therein named is beneficially entitled to the share. The House of Lords held that the certificates meant no more than that the person mentioned in the certificate is the person whose name stands on the register in respect of the share; but that statement was perfectly consistent with his being a trustee. In *Simon v. Anglo-American Co.* (5 Q. B. D. 185), the Court of Appeal decided that a company who registered a forged transfer of shares upon the invitation of an innocent purchaser, are not estopped, as against such purchaser, from denying his title. But all the Lords Justices (Bramwell, Brett, and Cotton) gave their opinions that, on the authority of *Bahia, &c., Co.*, the company would have been estopped as against a subsequent purchaser who completed his purchase on the faith of the certificate. In the present state of authority, therefore, it must be considered that the certificate is a statement that the person named in it is the *legal* owner of the share.

It is on a similar principle that a bill of exchange, blank in the name of the drawer, although not itself perfect as a negotiable instrument, is, when transmitted in the way of mercantile dealing, practically negotiable. Any person taking the instrument for value is justified in assuming that the acceptor has authorised any one to fill in the blank, and if he at once fills it in with his own name, the acceptor will doubtless be bound by this presumed authority. But if the owner, before filling up the blank, discovers that the acceptor has in fact given him no authority to do so, his power to bind the acceptor in this way is gone, and the question then is what was the authority given in fact (*Hogarth v. Latham & Co.*, 3 Q. B. D. 643).

While on these cases of estoppel, I may mention the case of *Re British Furnaces, &c., Co.* (7 Ch. D. 583), in which the Court of Appeal decided that a company, by issuing certificates of paid up shares, represents the fact of payment, so as to be estopped, as against a purchaser of the shares who had allowed

himself to be registered on the faith of the certificates, from insisting, under the 25th section of the Companies Act, 1867, that the shares are subject to a liability to calls.

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It has been seen that in English law the question whether (according to the procedure in force before the Judicature Act) the right to sue at law in his own name on the contract contained in the instrument passed to the indorsee or bearer, forms a good negative test of whether or not the instrument of debt is negotiable. The converse of this proposition does not hold good. The holder of an overdue bill or note could always confer the right on the transferee to sue in his own name, but he conveys no better title than he had himself. So the assignee of a Scotch bond, which has always been assignable by the law of Scotland could always sue in his own name in the English Courts, although he has no better title than those from whom he took the bond. So the assignee of a policy of assurance which was made assignable by statute (30 & 31 Vict. c. 144, s. 1) got from the statute no better title than his cedent. And doubtless the Judicature Act which enables everybody who has any legal or equitable claim to sue in his own name creates no new substantial privilege in favour of assignees of instruments not previously entitled to sue at law in their own names; nor does this Act make any instrument negotiable which is not so independently of it.

Converse does  
not always  
hold good.

I must now advert to bills of lading which are negotiable in a limited sense.

Bills of Lading  
negotiable in a  
limited sense.

A *bill of lading* is an instrument whose general character may be described as follows:—It is an acknowledgment or admission in writing by the captain (or, in mercantile language, *the master*) of a ship, as agent for the shipowners, that certain goods therein specified by marks have been shipped on board his ship, bound on a certain voyage, and to be delivered, subject to the exceptions and conditions therein specified, to shipper's order (or to the order of the consignees therein named, as the case may be). The admission is not conclusive against the shipowner as to the *fact* of the goods having been put on board (*M'Lean v. Fleming*, L. R. 2 H. of L. Sc. 128; *Brown v. Powell Duffryn Steam Coal Co.*, L. R. 10 C. P. 562), though it is (by

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statute 18 & 19 Vict. c. 111, s. 3) conclusive against the master who has signed the bill of lading, unless he can show that the mistake is "wholly by fraud of the shipper" (see *Valieri v. Boyland*, L. R. 1 C. P. 382). But, the goods being shipped on board, the bill of lading constitutes a contract in writing signed by the master as agent for the shipowner, binding the latter as bailee for the shipper or other person named in the bill of lading as the one for whom the goods are to be carried, to carry and deliver the goods safely according to the terms of the document and saving only the specified exceptions.

A bill of lading has been said to be the *symbol* of property in the goods, or to *represent* the goods while on board, for the purposes of commerce; and in a certain sense, this is correct.

It rarely happens that the title to merchandise can be effectually investigated, or the identity of the goods specifically traced, behind the shipment. Of the difficulties in the way of doing so the case of *Garbaron v. Kreft* (L. R. 10 Ex. 274) is an illustration. In that case there was no doubt of the fact that the whole of the goods constituting the shipment had been purchased and paid for by a third party. But for the purpose of specific appropriation, which was necessary to vest the *property* in the purchaser, the intention of the shipper, as expressed and carried out by the bills of lading, was held paramount, although that intention was proved to be a fraud.

The shipment itself is (*prima facie*) an act and evidence of ownership in the shipper, and his title to the goods at that point being assumed, the disposing power, whether by the terms of the bill of lading reserved to the shipper himself (*Ogg v. Shuter*, L. R. 1 C. P. D. 47), or given to another (*Garbaron v. Kreft*, L. R. 10 Ex. 274), is effectually vested in the person to whose order the bill of lading is made out. The goods being at sea, by usage of trade, the indorsement and delivery of the bill of lading, with the intention to transfer the property, transfers the legal property accordingly. And by the statute 18 & 19 Vict. c. 111, s. 1, the right of suing upon the contract of bailment contained in the bill of lading is transferred likewise (*The Freedom*, L. R. 3 P. C. 594, 598; *Barber v. Meyerstein*, L. R. 4 H. L. 317, 326).

Further, by the usage of trade, if the indorsement and

delivery of the bill of lading is for valuable consideration to a person who is not proved to be in *malâ fide*, the property so passed is discharged from any right of stoppage *in transitu* or other right which the shipper may have had as unpaid vendor of the goods (*Lickbarrow v. Mason*, 2 T. R. 63, & Smith's L. Ca. vol. 1; *Gurney v. Behrend*, 3 E. & B. 622).

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The advantage which is thus given, by the usage of trade, to the *bond fide* holder of a duly indorsed bill of lading is something more than the ordinary advantage of the legal title. The purchaser to whom the goods are consigned under a bill of lading has a complete legal title to and right of possession in the goods; and a sub-purchaser from him would, by the contract of purchase, acquire the legal title and right of possession exactly as it is in the first purchaser. But until the bill of lading is indorsed and delivered the rights of both are *liable* to be *divested* by the original owner exercising his rights, as unpaid vendor, to stop the goods *in transitu*; a power arising out of his original ownership, and when duly exercised, *revesting* the property in him by a title paramount to the legal title of the purchaser and the assigns of the purchaser who have not acquired the protection of a bill of lading duly indorsed and delivered.

To the effects, above stated, of the indorsement and delivery of a bill of lading it may be added that in the ordinary way of business the act of indorsement and delivery of the bill of lading is itself *prima facie* evidence of the intention to transfer the property (*Hibbert v. Carter*, 1 T. R. 745, *Houston on Stoppage in Transitu*, p. 147); and also that for the purposes of the extension of authority given to a factor under the Factors' Acts the possession of a bill of lading made out or indorsed to the Factor's order is precisely equivalent to the possession of the goods in bulk.

In the ordinary course of business, therefore, the indorsement and delivery of a bill of lading by the consignee suffices to give a clear title to the indorsee for value, either as absolute owner, if he has purchased the goods out and out; or, subject to a right of redemption, if he has taken the bill of lading by way of mortgage merely. In the latter case, the rights over the goods, as between shipper and consignee, remain as they were, subject

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only to the paramount right and title of the indorsee for value, and his assigns by endorsement and delivery of the bill of lading (*Spalding v. Ruding*, 6 Beav. 376, affirmed on appeal, 15 L. J. Ch. 374, and see note to *Berndston v. Strang*, L. R. 4 Eq. 486). The subject of the various rights of persons interested in goods under Bills of Lading will be more fully considered in the sequel.

Besides the instruments already mentioned in this chapter, I am not aware of any in regard to which a general usage having the force of law, and by which the instrument is in any sense negotiable, has been established.

Warrants,

I must here consider the position which has sometimes been maintained, that certain instruments called "warrants" are by the general custom of trade negotiable, and I shall presently advert to the privilege which has by the statutes commonly called the Factors' Acts, been extended to these instruments in common with all other instruments coming within the category of "document of title" within the meaning of those statutes. A *warrant* (in its most usual form) is an acknowledgment or certificate by the proprietor of a warehouse or wharf that certain goods therein described are stored on his premises deliverable to A. B. or his assigns (by indorsement or otherwise). It is commonly also stated on the document that the goods will not be delivered up except on production of the certificate.

are they in any  
sense negotiable  
by general  
custom?

Now there appears to have prevailed a very widespread impression amongst mercantile men, an impression to which a special jury has not unfrequently lent its authority (Dallas, C.J., in *Lucas v. Dorrien*, 7 Taunt. 278), to the effect that these warrants are negotiable, and there is even a decision by Sir J. A. Park, at *nisi prius*, to a similar effect (*Zwinger v. Samuda*, 7 Taunt. 265). In the latter case, however, the judges in Banc. did not adopt this view, although they held that the defendant, in the particular case, was estopped from disputing the plaintiff's right. The defendant in that case, a pledgee of the goods entered in the dock books in his own name, indorsed the dock warrant in blank, and handed it to



the owner (the pledgor) in exchange for a cheque which was dishonoured. The Court held that the pledgee had given credit to the pawnor and could not set up his right against a purchaser from the pawnor, who had paid for the goods on having the dock warrant so indorsed handed to him. The judgment of the Master of the Rolls in *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (5 Ch. D. 205, 285) does indeed say that it was established to his satisfaction that there was a *custom* in the iron trade relating to warrants. But on attentively reading that judgment it will appear that the custom so established only went the length that the warrant was commonly understood as a *representation* to the person taking it that there was no lien. The whole language of the decision is grounded on the theory of estoppel, or representation to the holder made *by the privity* and intention of the vendor.

It is established by decision that the relation of bailor and bailee cannot be constituted between the warehouseman and the indorsee until the former has *attorned*, so to speak, to the other, and consented to hold the goods as his agent (*Bentall v. Burn*, 3 B. & C. 423; *Imp. Bank v. L. & St. Katherine Docks Co.*, 5 Ch. D. 195). And in *Farina v. Home*, 16 M. & W. it is decided that this consent cannot be given in advance, so that the indorsement itself should effect a new bailment and constitute actual receipt by a purchaser within the Statute of Frauds. Mr. Benjamin (on Sales, 2nd ed., p. 675, 677) thinks this case decisive against the warrants being in any sense negotiable. I do not agree in this. If they were negotiable to the same extent that bills of lading are so, there would only be the anomaly which existed in the case of bills of lading before the Act 18 & 19 Vict. c. 111, whereby the right to sue was made to follow the property. But although I do not think the case of *Farina v. Home* decisive, I think the balance of authority is against the view that these warrants are at common law in any sense negotiable (see Blackburn on Sale, p. 297, 298, and the reference to this passage in *Meyerstein v. Barber*, L. R. 2 C. P. 674, 675).

I think it at least clear that no custom rendering these in-

No such custom  
established.

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How far do  
warrants  
confer a right  
under the  
doctrine of  
estoppel or  
representation.

struments *negociable* has ever been legally established, although the warehouseman or any other person privy to the issue of the document may be estopped, as against a purchaser acting on the faith of the facts as stated in the document, from denying the title of the person who according to the tenor of the instrument and the course of business known to the parties, appears to be the owner of the goods (*Zwinger v. Samuda*, p. 83, *supra*; *Knight v. Wiffen*, L. R. 5 Q. B. 660; *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 5 Ch. D. 205).

Blackburn (on Sale, p. 302) observes that there does not seem to be any ground for maintaining that the vendor who has given a delivery order to a purchaser from him is thereby precluded from setting up his rights of stopping *in transitu* against third parties who may have made advances on the faith of the delivery order. "He cannot set up any case inconsistent with the document which he has given to his purchaser, and on which he has allowed him to get credit. He cannot therefore deny that the person to whom he has handed the delivery order had a right to obtain possession. But this is so far from being inconsistent with the case of one who is stopping *in transitu* that it is a necessary and essential ingredient in it. He can exercise no right to stop the goods *in transitu*, unless the purchaser has had a vested right both of property and possession, defeasible on his insolvency, and it is impossible to say that the possession of a delivery order imports anything more than this." This is doubtless true in the case of a delivery order of goods in the hands of a bailee who, *consistently with the terms of the document*, may be a mere forwarding agent. But the case is different if the document is such as to represent that the goods are *at home* in the warehouse of the buyer, or otherwise at his absolute disposal, particularly if this is done with a view to the document being used as an instrument of credit; and this, I think, may be the effect of a *warrant* in the form to which I have referred on p. 68, *supra*, or of the warrant "deliverable (f. o. b.), to Messrs. , or their assigns by indorsement," which was the form in *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* (5 Ch. D. 205).

The practical importance of the question whether warrants

are negotiable by custom is somewhat diminished by the most recent of the Factors' Acts (40 & 41 Vict. c. 39), extending the policy of the previous Acts. But the policy of these Acts is not to render instruments of this kind negotiable, but to extend the principle of estoppel or holding out in regard to them, and cases may still easily arise which may make it important to remember that such instruments are not, according to the balance of authority, in any sense negotiable.

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What has been advanced against the supposed negotiability of warrants, applies with still greater force to a kind of instrument which it was at one time attempted to invest with a sort of negotiable character, namely *delivery orders* for iron which are contracts in writing by a manufacturer to make and deliver a certain quantity of iron of a certain kind by a certain day. The leading case in Scotland by which the indorsee of one of these documents sued the manufacturers was decided by the ultimate Court of Appeal in favour of the plaintiff, on the simple ground that the manufacturers had directly recognised and accepted him as the person with whom they were dealing; but the decision of the Lord Chancellor Cranworth shows clearly that the law will not recognise or countenance any attempt by contracting parties to create at will a "floating right of action" enforceable by a stranger to the contract (*Dixon v. Bovill*, 3 Macq. 1).

Delivery orders  
for iron.  
*Dixon v. Bovill.*

#### 5. *Persons selling under Process of Law.*

*Fifthly.* Persons selling goods under process of law can dispose of the property, and these I shall consider under five heads, namely:—

5. Persons selling under process of law.

- (A.) Sheriffs.
- (B.) Sequestrators.
- (C.) Liquidators of a company in a winding-up by the Court.
- (D.) Persons authorized by the Court under jurisdiction formerly enjoyed (in England) only by the Admiralty Court, but now by the powers of the Judicature Act (Ord. III., rule 2), *ut res magis valeat quam pereat*.
- (E.) Persons selling under a lawful distress.

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§ 2.

A. Sheriffs.

(A.) It has been repeatedly decided that the purchaser of a chattel interest in land from the sheriff at a sale under a writ of *fiery facias* acquires a good title to the extent of the right title and interest of the execution debtor; so that, if the writ be afterwards set aside, through the reversal by a Court of Error of the judgment on which it is founded, the debtor is restored only to the price in lieu of the chattel (*Anon. Dyer*, 363a (24); *Matthew Manning's case*, Co. Rep. part viii., 94b; *Doe dem Emmett v. Thorn*, 6 M. & S. 110). The principle of these cases equally applies to the sale of goods by a sheriff under such a writ, and it was decided so early as 15 Car. II., that the sheriff taking goods under a judgment, which was afterwards vacated as unduly obtained, was no trespasser, although the executing party might be (*Turner v. Felgate*, 1 Lev. 95).

The power therefore of the sheriff to sell the goods of the execution debtor under a *fiery facias* rarely admits of question. It depends on the writ, and if the writ is *ex facie* valid, that is enough. The sheriff has, however, no title to sell until he has seized the goods under the writ (*Ex parte Hall*; *in re Townsend*, 14 Ch. D. 132). In the case here referred to an arrangement purporting to be a sale was made between the debtor and the auctioneer, the sheriff standing by and not seizing until afterwards. The transaction was held to be a fraud; but it was decided that, no seizure having taken place, there was not and could not be, any valid sale by the sheriff.

By the 4th section of the Railway Companies Act, 1867, and the 4th section of the Railway Companies (Scotland) Act, 1867, both made perpetual by 38 & 39 Vict. c. 31, the rolling stock and plant of a railway company in the United Kingdom, when once opened for public traffic, is protected from being taken in execution, and a remedy is given to judgment creditors by the appointment of a receiver, or receiver and manager of the undertaking of the company. The protection given by this enactment continues even after the railway has been closed for public traffic (*The Midland Waggon Co. v. The Potteries, &c., Railway Co.*, 6 Q. B. D. 36).

Questions often arise whether the goods sold are the property of the execution debtor, or of some one else. These questions raise points of considerable nicety, and are treated of in some

detail further on (p. 79 *et seq.*). In the meantime I observe that means have been provided by the proceeding known as *interpleader*, to enable the sheriff to escape the responsibility of deciding such questions at the risk of being liable (as he would be by the common law if he made a mistake) to an action by the owner for the tortious conversion of the goods. *Interpleader* was formerly only competent by bill in Chancery, but was introduced into the practice of the Common Law Courts by the Act 1 & 2 Will. 4, c. 58, and further regulated by 1 & 2 Vict. c. 45, s. 2; 8 & 9 Vict. c. 109, s. 19, and by sections 12—18 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126); and Order I., r. 2 under the Judicature Act. A similar proceeding under County Court process is instituted by section 31 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). It has been decided that interpleader proceedings under this statute cannot be used so as to affect a purchaser of the goods, by staying an action against him, or otherwise.

An important section, in regard to this subject, of the Common Law Procedure Act, 1860, is the 13th, which enacts as follows: "When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts (*viz.*, the Superior Courts of Common Law at Westminster, or the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham), and some third person claims to be entitled under a bill of sale or otherwise to such goods and chattels, by way of security for a debt, the Court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or judge may seem just."

The execution used upon decrees and orders of the Court of Chancery differed in some respects from that used upon judgments of the Common Law Courts. The mode was two-fold; by attachment of the person for contempt, and by sequestration of the goods. The two writs might proceed concurrently, but prior to the Debtor's Act, 1869, attachment was, as the more effectual remedy, the one more frequently used. B. Sequestrators

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Subsequently to the Debtor's Act, 1869 (which abolished imprisonment for debt except in certain specified cases) sequestration became more frequently resorted to; and the mode of procedure was laid down in the Order of 7th January, 1870, made in consequence of the Debtor's Act coming into operation (see Morgan's Chancery Acts, 4th ed. p. 296, *et seq.*).

The "rules of Court" under the Judicature Acts enact that sequestration may be used to enforce a judgment for the payment of money into Court or for the recovery of any property other than land or money (Order XLII., r. 2, 4; Order XLVII.).

It has been doubted by eminent judges of the Court of Appeal (*Ex parte Nelson, In re Hoare*, 14 Ch. D. 41) whether sequestration is a competent, as it is certainly an inappropriate process, to follow on a simple judgment for payment of a sum of money: and by the rules made in April, 1880 (Order XLVII., r. 31), the practice of issuing sequestration for payment of costs, which still survived in regard to orders of the Chancery Division was put an end to, except by leave of the Court or a judge. The appropriate process in these cases is a *feri facias*.

It can only be under very exceptional circumstances (if at all) that a sale should now proceed under a sequestration of goods; but as there is nothing in the recent legislation expressly to prevent such a sale, it may be well to state the old practice.

The powers of the sequestrators in taking possession are in some respects wider than those of the sheriff. They take possession of all tangible property as they find it in the actual possession of the debtor, and in so taking possession are not bound to regard the claims of third parties, who can only make good a claim by applying to the Court and submitting to be examined *pro interesse suo* (Smith's Chancery Practice, p. 199). The sequestrators have no power, by virtue of the writ, to sell the goods. If power to sell was desired, it had to be obtained upon an application to the Court upon the return being made by the sequestrators taking possession. The application was made upon notice to the debtor, and the creditor on such an application was entitled to the order where the writ was issued for disobedience to an order directing the payment of money (Smith, Ch. Pr. ed. 1862, p. 199; *Cuvil v. Smith*, 3 Bro. C. C.

361 ; *Mitchell v. Draper*, 9 Ves. 208). If upon the creditor so applying, a third party claimed to be entitled to the goods, and submitted to be examined *pro interesse suo*, the examination would be ordered accordingly ; and if the right claimed was under a bill of sale or otherwise *in security for a debt*, the Court would act by analogy to the procedure pointed out by the 12th section of the Common Law Procedure Act, 1860.<sup>1</sup>

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(C.) The next class are liquidators in a compulsory winding up. I have already (p. 53) adverted to the position of the liquidator in a voluntary winding up, whose position, except that his acts do not require the sanction of the Court, does not differ from the liquidator in a winding up by the Court. I must here observe that, in the case of *Re Marine Mansions Co.* (L. R. 4 Eq. 604), V. C. Wood decided that the liquidator of a Company was not, like a trustee in bankruptcy, within the protection of the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1. But for this decision I should have thought that the liquidator in possession of the chattels and proceeding to sell them, is protected by this Act ; the liquidator in a compulsory winding up being a person "seizing the chattels in the execution of a process of a Court authorizing the seizure ;" and the liquidator in a voluntary winding up, being an assignee of the chattels under an "assignment for the benefit of the creditors," constituted by the combined effect of the Companies Act, the resolution to wind up, and the liquidator's possession under the authority so constituted. The decision, however, *Re Marine Mansions Co.*, appears to have been acquiesced in, and in later cases of a similar class the point is not even raised (*Hodson v. Tea Co.*, 14 Ch. D. 859).

C. Liquidators.

(D.) The general power to sell the subject matter pending an action to avoid a common loss (*ut res magis valeat quam pereat*), seems, curiously enough, to have been, before the Judi-

D. Sale of perishable goods under power of the Judicature Acts.

<sup>1</sup> In *Jacobs v. De Morgan*, Sept. 6, 1877, Mr. Justice Fry, sitting as Vacation Judge, ordered a sale by the sequestrators upon the terms of the sequestrating creditor paying

into Court the amount sworn to by the claimant as due upon the bill of sale. This was a sequestration for costs, after a *subpoena*, according to the old practice in Chancery.

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Judicature Acts,  
Order LII., r. 2.

cature Acts, exercised in England by the Admiralty Court only. I have already pointed out the introduction, by the Common Law Procedure Act, 1860, of a power to sell goods seized by sheriffs, where an adverse title is claimed *by way of security* only. The power under the Judicature Acts (Order LII., r. 2), extends to the case where the absolute ownership is in question. The rule is this:—"It shall be lawful for the Court or a judge, on the application of any party to an action, to make any order for the sale by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may seem desirable, of any goods, wares or merchandize which may be of a perishable nature, or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once." Under this section an order has been made for sale of a horse who, pending the litigation, is eating his head off (*Bartholomew v. Freeman*, 3 C. P. D. 316); and frequent orders have been made for sale of machinery, which requires expenditure for oiling and keeping in good condition. In the cases here referred to a receiver, or receiver and manager, is appointed to take care of the property pending the litigation, and he is the person to whom the authority to sell is given.

E. Persons  
selling under  
distress.

(E.) Persons selling under a lawful distress.

The power of distress may be exercised by a landlord under his common law right, or it may be exercised under certain statutes whereby a right similar to that of the landlord is given for recovering dues of various kinds.

The landlord's right at common law seems to have been merely to hold the goods until the rent due is paid; but by statute 2 W. & M. c. 5, power was given, in a prescribed manner, to sell the distress "for the best price that can be gotten for the same," and this power is extended and regulated by various other statutes. These are 8 Anne 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19; 56 Geo. III. c. 50; 3 & 4 W. IV. c. 42, ss. 37, 38; 14 & 15 Vict. c. 25. It has been decided by the Common Pleas Division that a landlord who sells upon a distraint, is by the express words of the statute, "for the best price, &c.," precluded from imposing a condition of sale to the effect that



hay, &c., sold, shall be consumed on the premises; although the tenant was under covenant by his lease to consume hay, &c., on the premises, and although, under 56 Geo. III. c. 50, s. 11, any purchaser *from the tenant* would have been necessarily bound by such a condition (*Hawkins v. Wulfrond*, 1 C. P. D. 250). The exemption from distress given by the statute 11 Geo. II. c. 19, s. 21, to goods delivered to an auctioneer for sale is confined to goods on the premises of the auctioneer, and does not extend to goods sold on the demised premises not being the auctioneer's (*Lyons v. Elliot*, 1 Q. B. D. 210). For other points relating to the construction and effect of these statutes, I refer to the special treatises on the subject, particularly Woodfall on Landlord and Tenant, p. 374 *et seq.*

Amongst the classes of things which are privileged by the common law from distress, I may here specially refer to the exemption which the common law makes, for the benefit of trade, of things delivered to a person exercising a public trade to be managed in the way of his trade. These, with other things exempted, are discussed in the notes to *Simpson v. Hurtopp*, 2 Sm. L. Ca.; and for further discussion of the exemption here particularly mentioned I refer to *Swire v. Leach*, 18 C. B. (N. S.) 479 and *Miles v. Furber*, L. R. 8 Q. B. 77.

Where a remedy in the nature of distress is merely the creature of statute, the warrant must show on its face that it is strictly in accordance with the statute, otherwise no title is acquired under it (*Lock v. Sellwood*, 1 Q. B. 736).

The power of distress may be given by a clause of a mortgage deed, whereby the relation of landlord and tenant is established between the mortgagee and the mortgagor who remains in possession, and the mortgagee becomes entitled to levy a distress for the arrears of the rent reserved. This is good provided there is a real tenancy at a real rent, such as might fairly be assessed as an occupation rent (*In re Stockton Iron Furnace Co.*, 10 Ch. D. 335). A mortgagor in possession may even attorn to a second mortgagee (*Morton v. Wood*, L. R. 4 Q. B. 293), and this, although there is a clause of attornment in the first mortgage deed, provided the whole amount of rent attorned for is not more than a fair rent (*Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226).

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Any such instrument of attornment executed after the 1st of January, 1879, must under the Bills of Sale Act, 1878, in order to be good against creditors, be registered as a bill of sale, subject to the proviso that the section shall not extend to any mortgage of an estate or interest in land, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent. Independently of this clause in the Bills of Sale Act, it has been decided that an attornment clause in a mortgage, which did not satisfy this criterion, is void, as a fraud on the Bankruptcy law (*Ex parte Williams, In re Thompson*, 7 Ch. D. 138; *Ex parte Jackson, In re Bower*, 14 Ch. D. 725).

The mortgagee by taking possession of the chattels by way of distress under the attornment clause, does not lose his right, as mortgagee, to the fixtures which in a case of pure tenancy would have been regarded as tenant's fixtures (*Ex parte Punnett, In re Kitchen*, 16 Ch. D. 226).

Where the attornment clause expressed the tenancy as one from year to year, with an agreement that the tenancy might be determined at any time at the will of the mortgagee, it was held by the Court of Appeal that the mortgagee was entitled, under sec. 34 of the Bankruptcy Act, 1869, to distrain for the rent (being less than a year's rent) due to him from the mortgagor at the time of the filing by the latter of a liquidation petition (*In re Threlfall, Ex parte Queen's Benefit Building Society*, 16 Ch. D. 274).

By the 34th section of the Bankruptcy Act, 1869, the landlord or other person to whom rent is due, may distrain so that the distress shall be available for only a year's rent accrued due before the bankruptcy. This right has been decided by the Chief Judge Bacon to be paramount to the title of a receiver in the bankruptcy (*Ex parte Till, In re Mayhew*, L. R. 16 Eq. 97). But the section does not apply to the right of a creditor who has a statutory remedy in the nature of distress for a debt which is not rent, such as money due to a gas company for the supply of gas (*In re Roberts, Ex parte Hill*, 25 W. R. 784, C. A.). The Bankruptcy Act in no way interferes with the landlord's common law right to distrain for rent accrued *after* the bankruptcy, unless the trustee disclaims (*Ex parte Hale*,

*In re Binns*, 24 W. R. 300 C. J. B.). Where there is a liquidation under the Companies Act, the Court will exercise its discretion to protect the landlord in his full right of distraint for rent accrued after the liquidation, though he is only entitled to prove as a creditor for rent accrued up to that date (*In re South Kensington, &c.*, 17 Ch. D. 161; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250).

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### SECTION III.—QUESTIONS OF COMPETITION IN EXECUTIONS AND ON BANKRUPTCY.

It was observed (p. 72), in treating on the sale of goods under process of law, that questions often arise whether the goods sold are the property of the debtor against whom the proceeding is taken, or the property of some one else. Competition.

These questions may be divided into two classes. Those of the first class arise between the execution creditor or the trustee in bankruptcy, as representing the general body of creditors on the one hand, and some person claiming the property by a title adverse to both on the other hand. Questions of the second class arise between the execution creditor and the trustee in bankruptcy claiming adversely to each other.

I consider first the questions which arise between the execution creditor or trustee in bankruptcy on the one hand, and a person claiming the property by a title adverse to both on the other hand. I shall consider these questions under the following heads :—

Execution creditor or trustee in bankruptcy, in competition with persons claiming adversely to both.

1. Questions arising under the Statute 13 Eliz. c. 5.
2. Questions arising out of a conveyance gift or transfer by the debtor, or a seizure and sale of his goods, amounting to an act of bankruptcy under the 1st and 2nd sub-sections, or the 5th sub-section, of sec. 6 of the Bankruptcy Act, 1869. And, as a nearly allied class of questions, I shall consider those arising under sec. 92 of this Act, relating to fraudulent preferences.
3. Questions arising under the reputed ownership clauses of the Bankruptcy Acts; that now in force being sec. 15, sub-sec. 5 of the Bankruptcy Act, 1869.
4. Questions arising under the Bills of Sale Act.

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1. Questions  
under 13 Eliz.  
c. 5.

1. The Statute 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5) is made for avoiding fraudulent conveyances and alienations of lands, tenements, goods, and chattels, made with the intent to delay, hinder, or defraud, creditors and others : and declares that such conveyances and alienations shall (but only as against the person whose action or debt is delayed, hindered, or defrauded) be utterly void.

For a full analysis of decisions upon the statute, I refer to Mr. Henry May's exhaustive work upon this and the kindred statutes ; and also to the authorities collected in Smith's *Leading Cases*, under the head of *Twyne's Case*. I shall here note only some of the more recent decisions upon the nature of the presumption by which a fraud upon creditors is inferred.

The kind of transaction most frequently avoided under the Act is a voluntary settlement, through which a person, contemplating insolvency, attempts to put the bulk or part of his property out of the reach of creditors. The fact of a settlement being voluntary is, however, not conclusive of fraud : and, on the other hand, a settlement for valuable consideration may come within the scope of the law, if actual intention to defraud is proved (*Holmes v. Penney*, 3 K. & J. 90). It has even been held that a settlement on marriage, where the marriage was proved to be only part of a scheme to defeat creditors to which the wife was a party, could be set aside by a creditor (*Bulmer v. Hunter*, L. R. 8 Eq. 46 ; *Columbine v. Penhall*, 1 Sm. & Giff. 228). When the settlement is voluntary, it is not necessary to prove actual intent to defeat or delay creditors ; it is sufficient, if the circumstances are such that the settlement *necessarily* would have that effect. Or, which is the same thing, the intent to defraud may reasonably be inferred from such circumstances without further inquiry as to what was actually in the mind of the settlor (*Freeman v. Pope*, L. R. 5 Ch. 538 ; *Spencer v. Slater*, 4 Q. B. D. 13. Compare *Boldero v. London and Westm. Discount Co.*, 5 Ex. D. 47). Where a person voluntarily settles *his own property* upon trust for himself until bankruptcy or death, and then upon trust for his wife and family, there is enough on the face of the transaction to presume the fraudulent intent in regard to creditors (*Ex parte Stephens In re Pearson*, 25 W. R. 126). The attempt by any person

so to secure his own income for his own benefit against creditors is indeed a fraud by the principles of common law and common sense, and so it is held in Scotch as well as in English law (*Learmouth v. Miller*, L. R. 2 H. L. Sc. 438). Where a person, about to engage in a business involving large liabilities, made a voluntary settlement putting the bulk of his property out of reach of his creditors, it has been held that a creditor, suing on behalf of himself and other creditors, was entitled to have the settlement set aside (*Mackay v. Douglas*, L. R. 14 Eq. 106). And it is enough that the fraudulent intention should be proved on the part of those taking the gift, although the settlor himself, from age and infirmity, is merely a passive instrument of the fraud (*Cornish v. Clark*, L. R. 14 Eq. 184). I refer also to *Kent v. Riley* (L. R. 14 Eq., 190), and *White v. Witt* (24 W. R. 727), as recent cases where the fraudulent intent was not held proved.

This statute of Elizabeth has been liberally construed, and one of its most important effects is that, when a vendor, after a sale of goods, is allowed by the purchaser to remain in possession, a strong presumption of fraud arises, so that the creditors of the vendor may avoid the transaction.

But where the sale is effected by means of a written instrument, and is not absolute, but subject to a condition or proviso expressed in the instrument, that the goods shall remain for a time in the possession of the vendor; as in the case of an ordinary mortgage with a proviso for quiet enjoyment until default, then, as the nature of the transaction does not call for any transfer of possession, the absence of such transfer is no evidence of fraud (*Martindale v. Booth*, 3 B. & A. 505; *Reed v. Wilmot*, 7 Bing. 577). And it has been further held that if the intention of the instrument is *bonâ fide* to be a mortgage, the retention of possession by the mortgagor is not an indication of fraud within the statute, although there was no express proviso for quiet enjoyment until default (*Cook v. Walker*, 3 W. R. 357, and see *Steward v. Lombe*, 1 Brod. & Bing. 586; 4 J. B. Moore, 281, Davidson's Conveyancing, Vol. II., 4th edit., p. 643).

2. By sec. 6 of the Bankruptcy Act, 1869, sub-sects. 1, 2, 2. Questions

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arising out of  
acts of  
bankruptcy, &c.

and 5, the following, amongst other acts or defaults, are included under the expression "acts of bankruptcy;" and therefore, by reason of the principle of "relation back," are void against the trustee in bankruptcy, namely:—

- (1) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :
- (2) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof :  
\* \* \* \* \*
- (5) That execution issued against the debtor on any legal process, for the purpose of obtaining payment of not less than £50, has in the case of a trader been levied by seizure and sale of his goods.

And in connection with this section must be read the 11th sec. of the Act, which limits the time for "relation back" to a period of twelve months preceding the order of adjudication, and then only if there were at the time of the act of bankruptcy a debt capable of supporting an adjudication, which has remained unpaid at the time of adjudication.

To the first sub-section above quoted there is no corresponding express enactment in previous bankruptcy statutes; but it had nevertheless been long established under previous statutes that a conveyance by a debtor of all his property for the benefit of creditors generally, was an act of bankruptcy (*Stewart v. Moody*, 1 C. M. & R. 777; *Siebert v. Spooner*, 1 M. & W. 718; *Ex parte Alsop*, 1 D. F. & J. 289; *Ex parte Wensley*, 1 D. J. & S. 273). This appears to have been on the ground that such a deed is presumed to be a fraud against a non-assenting creditor, and consequently any creditor who had assented to or acquiesced in the conveyance, could not avail himself of it as the ground of a petition of adjudication of bankruptcy (*Ex parte Alsop*, 1 D. F. & J. 289; *Ex parte and Re Strong*, L. R. 2 Ch. 374). It might be questioned whether the language of the Act of 1869 affords room for the exception: but I should infer, from the general tenor of the decisions under this Act, that if the point

were called in question, it would be held to have been the intention of this sub-section merely to declare the principle established by decisions before the Act, and that the exception would apply as before. This being the case the sub-section appears redundant, as the cases embraced by it only form a portion of the class described in the second sub-section above quoted. It need hardly be said that where a distinct intention appears, to exclude a certain creditor or class of creditors from the benefit of an arrangement purporting to be for the benefit of creditors generally, the act would be a fraud on the general principles of law as well as an act of bankruptcy under the 2nd sub-sec. For instance, see *Ex parte Saffery*, 4 Ch. D. 555, and same case *sub nom. Tomkins v. Saffery*, 3 App. Ca. 213.

The second section above quoted of the 6th section of this Act, embraces within its scope all those sections of previous statutes which relate to "fraudulent conveyances" and includes all conveyances which have been construed as coming within the scope of the statute 13 Eliz. c. 5, and as being made void against creditors by that statute.

Referring to what has been already said upon the statute of Elizabeth, and to the detailed exposition in Mr. May's book already mentioned, and also to the notes upon this sub-section of the Act of 1869 in Mr. Yate Lee's book on bankruptcy, I shall here content myself with stating the general principles, and citing some of the more recent cases on the subject.

The gist of the fraud is the intention on the part of the debtor to prevent his creditors from getting their due whether in respect of amount or timely payment. "Delay, hinder, or defraud" are the words used in the statute of Elizabeth; "defeat or delay" are the words used in the previous bankrupt Acts, and although the intent to delay, &c., is not expressly mentioned in the Act of 1869, the scope of the former enactments does not appear to be altered, and is certainly not narrowed by the omission to express the particular modes of the intent struck at (*In re Wood*, L. R. 7 Ch. 302, 305). The authorities under the older Acts will therefore be in point under the 2nd sub-section of section 6 of the Act of 1869.

In some of the decisions a distinction has been made to this effect, that, the object of the bankruptcy laws being to obtain

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an equal distribution of assets, a transaction having this tendency is more easily presumed to be a fraud under these Acts than under the statute of Elizabeth (*Alton v. Harrison*, L. R. 4 Ch. 622, 625; *Allen v. Bonnett*, L. R. 5 Ch. 577, 581). It is to be noted on the other hand that the operation of the statute of Elizabeth is not limited, like that of the bankrupt statutes, to the period of twelve months or any other period; and if a fraud under this statute is established, the transaction may be set aside by the trustee in bankruptcy, or by a creditor suing on behalf of himself and all other creditors, notwithstanding the lapse of more than twelve months. The same may be said of any transaction which would be fraud against creditors at common law; if there are any such transactions which the statute of Elizabeth is not broad enough to cover; such transactions for instance as are referred to by Lord Justice Giffard in *Allen v. Bonnett*, L. R. 5 Ch. 581. When bankruptcy proceedings are actually pending or imminent, any agreement which clearly appears intended to defeat the policy of the law for the due distribution of the assets is void as against public policy, and cannot be enforced against the contracting party, although not a creditor (*McKewan v. Sanderson*, L. R. 20 Eq. 65; compare case between same parties on *plea*, 15 Eq. 229). Such collusive arrangements are directly struck at, and severe penalties imposed on the creditor who is party to them, by the Scotch Bankrupt Statute (19 & 20 Vict. c. 79, s. 150; *Carter v. McLaren & Co.*, L. R. 2 H. L. Sc. p. 120).

Any agreement to the effect that something which is the property of a person up to the time of bankruptcy, shall upon his bankruptcy become the property of some one else, is entirely illegal and void (*Ex parte Mackay*, L. R. 8 Ch. 643; *Ex parte Williams*, *In re Thompson*, 7 Ch. D. 138; *Ex parte Jay*, *In re Harrison*, 14 Ch. D. 92).

But where there is an actual sale of goods for money, the transaction was held to be neither a fraud nor a fraudulent preference, although the vendor had the intention, which was communicated to the buyer, to apply the purchase money in paying certain favoured creditors (*Ex parte Stubbins*, *In re Wilkinson*, 17 Ch. D. 58 (C. A.)).

It has long been established that where a debtor assigns all



his property for a past debt, the transaction is fraudulent and an act of bankruptcy within the bankrupt statutes, and it is well settled that such a transaction is within the scope of the second sub-section of the Act of 1869. The law on this branch of the subject is well summarized by Lord Justice Mellish in his judgment in the case of *In re King, Ex parte King* (2 Ch. D. 256, 263): "An assignment of all a debtor's property for a past debt is an act of bankruptcy. A merely nominal exception of part of the property will not prevent this, but an exception of a substantial part will prevent it. Whether an exception is substantial must of course depend on the circumstances of the case. If the assignment includes all the property, and is made in consideration of a past debt and of a further advance made at the time, the further advance, if substantial, has the same effect as a substantial exception out of the property. It is laid down in several of the common-law cases, that if a bill of sale is subsequently given in pursuance of an agreement entered into at the time of the further advance, it stands on the same footing as if it had been given at the time of the further advance. In *Ex parte Fisher* we qualified this rule by deciding that where the giving of the bill of sale is purposely postponed till the circumstances of the debtor become hopeless, the antecedent agreement will not support it." This summarizes the law to be extracted from a series of decisions to which the following as the most recent will give the clue:—*Woodhouse v. Murray*, L. R. 2 Q. B. 634, 4 Q. B. 27; *Ex parte Foxley, In re Nurse*, L. R. 3 Ch. 515; *Mercer v. Peterson*, L. R. 3 Ex. 104; *In re Wood*, L. R. 7 Ch. 302; *Ex parte Hawker, In re Keely, Ibid.*, p. 214; *Ex parte Reed and Steel, In re Tweddell*, L. R. 14 Eq. 586; *Ex parte Fisher, In re Ash, Ibid.*, p. 636; *Ex parte Trevor, In re Burghardt*, 24 W. R. 301. And I may add the subsequent cases of *Ex parte Sheen, In re Winstanley*, 1 Ch. D. 290, 560; *Ex parte Threlfull, In re Williamson*, 25 W. R. 127; *Heath v. Cochrane*, 46 L. J. Q. B. 727; *In re Gibson, Ex parte Bolland*, 8 Ch. D. 230; *Ex parte Cooper, In re Baum*, in the Court of Appeal, 10 Ch. D. 313, 324 (which throws some doubt on whether the case of *Philps v. Hornstedt*, 1 Ex. D. 62, in the Exchequer Chamber, was well decided); *Ex parte Burton, In re Tunstall*, 13 Ch. D. 102;

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*Ex parte Field, In re Marlow, Ibid.*, p. 106, *n.*; *Ex parte Dann, In re Parker*, 17 Ch. D. 26. Where a document is set up which, on the face of it, is an act of bankruptcy, being an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove not only that the agreement did exist in fact, but that it was in all respects a *bond fide* agreement (*Ex parte Kilner, In re Barker*, 13 Ch. D. 245, 252).

Where a member of the Stock Exchange, being unable to meet his engagements, gave notice of that fact to the secretary of the Stock Exchange, and so set in motion a machinery having the effect, according to the rules of the Stock Exchange, of placing his assets at the disposal of the Committee of the Stock Exchange for distribution amongst members of their own body to the exclusion of other creditors; and had as part of the arrangement given the secretary a cheque for £5000, forming his whole banker's balance, and being in fact five-eighths of his assets; the giving of the cheque, viewed as part of the whole arrangement above mentioned, was held to be an act of bankruptcy (*Tomkins v. Saffery*, H. L. Nov. 17, 1877, L. R. 3 App. Ca. 213); and was also, under the circumstances more fully stated further on, held to be a fraudulent preference under the 92nd section of the Act.

Where goods of a trader have been seized by the sheriff, and thus, as it may be said, an inchoate act of bankruptcy under the 5th sub-section above quoted has been committed, any transaction between the debtor and the execution creditor for giving the latter the benefit of his security without an actual sale by the sheriff taking place (the debtor being at the time insolvent), is a fraud upon the creditor and an act of bankruptcy under the 2nd sub-section. This was decided by the Lords Justices in the case of *Ex parte Pearson, In re Mortimer*, L. R. 8 Ch. 667. The sheriff in an execution for debt had seized six horses the property of the debtor, who was a contractor. The debtor agreed with the creditor to sell him ten horses by private contract; and pursuant to an arrangement made at the time of the sale, the horses remained for a time in

the stable of the debtor who had the use of them for a certain payment per day. The horses were, however, on the eve of the debtor's filing a petition for liquidation, removed and sold by the creditor. The Lords Justices, while differing in opinion as to whether the transaction was in effect a "seizure and sale" by the sheriff so as to be an act of bankruptcy within the 5th sub-section above quoted, and also as to whether it was a "fraudulent preference" within the 92nd section of the Act, were both of opinion that the transaction was a mere contrivance to evade the law, and as such was a fraudulent dealing with the goods and an act of bankruptcy within the 2nd sub-section of the 6th section of the Act.

A debtor L., being on the eve of bankruptcy, drew out all his balance at his bankers, and sent it to K., an accountant whom he employed, and who was a creditor. This was done, as L. admitted in his examination, for fear that the other creditors should attach the balance at his banker's. K. took back the money, and refused to accept it unless L. consented to his paying his own debt out of the money, to which, after some discussion, L. agreed, and accordingly a sum of £421 was appropriated for this purpose. It was held that the act of L. in drawing out the balance, he being then insolvent, was an act done for the purpose of defeating creditors and an act of bankruptcy (*Ex parte Halliday, In re Liebert*, L. R. 8 Ch. 283).

Section 92 of the Bankruptcy Act, 1869, which deals with "fraudulent preferences," is as follows :—

Fraudulent preferences.

"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, become bankrupt within three months after the date of making, taking, paying, or suffering the same,

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be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act ; but this section shall not affect the rights of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration."

The principle of fraudulent preference is one which has been known to the bankrupt law for more than a century (Yate Lee on Bankruptcy, note to s. 92). It arose where the debtor, in contemplation of bankruptcy—that is, knowing his circumstances to be such that bankruptcy must be or would be the probable, though it might not be the inevitable, result—*ex mero motu*, made a payment of money or a delivery of property to a creditor, not in the ordinary course of business and without any pressure or demand on the part of the creditor (*Nunes v. Carter*, L. R. 1 P. C. 342, 348 ; *Marks v. Feldman* L. R. 5 Q. B. 275, *per* Martin, B., p. 283). Thus in the case of Halliday above mentioned (L. R. 8 Ch. 283), it was considered that even if the whole transaction had not been void as an act of bankruptcy, the payment to K. so far as relates to the £421 would have been a fraudulent preference. The transaction was not in the ordinary course of business ; and K. made no demand of any kind until after the voluntary payment had been made.

The 92nd section of the Act of 1869, while apparently intended to express and preserve the general principle of the law of fraudulent preference, introduces some considerable changes. Thus in lieu of raising the inquiry whether what was done was "in contemplation of bankruptcy," the Act provides certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts as they become due from his own moneys, and that he should become bankrupt within three months (*Butcher v. Stead*, H. of L., *per* Lord Cairns, 24 W. R. 463). But, as the same authority remarks, the Act appears to have left the question of "pressure" as it stood under the old law ; for where there is pressure it would be impossible to infer the motive implied by the word "preference." This principle, which was affirmed by the House of Lords in the case of *Butcher v. Stead*, had previously been given

effect to in the following cases:—*Ex parte Topham, In re Walker* (L. R. 8 Ch. 614); *Ex parte Bolland, In re Cherry* (L. R. 7 Ch. 24); *Ex parte London and County Banking Company, In re Brown* (L. R. 16 Eq. 391); *Ex parte Blackburn, In re Cheesebrough* (L. R. 12 Eq. 358); *Ex parte Craven, In re Craven and Marshall* (L. R. 10 Eq. 648); *Ex parte Tempest, In re Craven and Marshall* (L. R. 6 Ch. 70). See also *Ex parte Hodgkin, In re Softley* (L. R. 20 Eq. 746). An unequivocal demand by the creditor remains, therefore, as before, sufficient to prevent the transfer or payment being deemed a fraudulent preference. On the same principle, where a payment or transfer is made in the regular and ordinary course of business there is no room for a presumption of the motive implied by preference, and the law on this point also remains as before (*Ex parte Norton, In re Golden*, L. R. 16 Eq. 397; *Ex parte Kevan, In re Crawford*, L. R. 9 Ch. 752; *Miller v. Barlow*, L. R. 3 P. C. 733).

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Although a transaction is not a *fraudulent preference*, it may still remain a question whether or not it is a fraud under the sections of the Act already considered, as well as under the statute of Elizabeth, or at common law. Thus a transaction may be shown not to be a fraudulent preference by reason of "pressure;" but a creditor is not of course to get an undue advantage by pressing his debtor to an act which he knows to be a fraud (*Ex parte Reader, In re Wrigley*, L. R. 20 Eq. 763).

By the saving clauses at the end of sect. 92, the Act of 1869 has considerably narrowed the class of cases which can be brought within the principle of fraudulent preference. Before this Act, if a payment was made of a debt without pressure, and in contemplation of bankruptcy, it was a fraudulent preference, even although the person receiving the payment did not know he was being fraudulently preferred. It has been a matter of some controversy whether or not this was altered by the saving clause in question; and it has been decided by the House of Lords as the ultimate Court of Appeal affirming previous decisions of the Courts below, that where a debtor has made a payment to a creditor under circumstances which make that payment a fraudulent preference under this section, the cre-

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ditor will be protected by the saving clause if he has received the payment without knowledge that he was being fraudulently preferred, and in respect of a debt owing for valuable consideration (*Butcher v. Stead*, H. of L. July 12, 1876, affirming same case *sub ncm. Ex parte Butcher, Re Meldrum*, L. R. 9 Ch. 595; and confirming upon this point the effect of the decisions *Ex parte Kevan, Re Crawford*, L. R. 9 Ch. 752; *Ex parte Norton, In re Golden*, L. R. 16 Eq. 397, 411; *Ex parte Tempest, In re Craven and Marshall*, L. R. 6 Ch. 70, 75, 76; *Ex parte Blackburn, In re Cheesebrough*, L. R. 12 Eq. 358). The burden of proof in such a case is on the person alleging that the payment is protected (*Re Tate, Ex parte Tate*, 26 W. R. 52).

It has been already mentioned that the giving of the cheque for £5000 in the case of *Tomkins v. Saffery* (L. R. 3 App. Ca. 213, p. 69 *a, ante*) was held to be a fraudulent preference. It should be mentioned that the debtor in that case made statements to the Stock Exchange Committee to the effect that he had no other debts, but it was held that the Stock Exchange creditors being well aware of the debtor's insolvency, and that they were being preferred to his general creditors (if any), were fixed with the knowledge of what the debtor himself knew, and as they took their chance of his story being true, they must incur the consequences of its being false.

To render complete the account of transactions which are deemed fraudulent under the Bankruptcy Acts, I ought here to draw attention to the general saving provision which is embodied in section 94 of the Act of 1869. For the present purpose I may omit the 1st and 2nd sub-sections, and quote the section as follows:—

“ 94. Nothing in this Act contained shall render invalid,

\* \* \* \* \*

“(3.) Any contract or dealing with any bankrupt made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication.”

In former statutes, the word "transaction" has been coupled with "contract" and "dealing," and it has been suggested that the scope of the saving clause is restricted by the omission (Yate Lee, ed. 1871; see *Krehl v. Great Central Gas Co.*, L. R. 5 Ex. 289). But it has been decided that the intention of the existing statute upon this point is equally wide with former ones (*Ex parte Arnold*, *In re Wright*, 24 W. R. 977).

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It may be observed in conclusion upon this subject that the gist of the fraud against which the bankruptcy law is directed is a fraud against the general body of creditors, and if the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an individual creditor who claims a security on it, the trustee ought not to take proceedings for the recovery of the property himself, nor will the individual creditor be allowed to take them in his name (*Ex parte Cooper*, *In re Zucco*, L. R. 10 Ch. 510).

Here I may mention the clause in the Companies Act, 1862, which enacts with regard to companies a rule analogous to that established in bankruptcy with regard to fraudulent conveyances. Section 153 enacts that "where any company is being wound up by the Court, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding-up and the order for winding-up, shall, unless the Court otherwise orders, be void." The effect is that the period between the commencement of the winding-up (*i.e.*, in a winding-up by the Court the presentation of the petition, and in a voluntary winding-up the passing of the resolution) and the order for winding-up, becomes analogous to that between the act of bankruptcy and the order for adjudication, and that the dispensing power of the Court is used in cases analogous to those which would come under the saving clause in section 94 of the bankruptcy Act above cited (see *In re Wiltshire Iron Co.*, *Ex parte Pearson*, L. R. 3 Ch. 443; *Gibbs and West's case*, L. R. 10 Eq. 312; *In re Liverpool, &c., Association*, *Ex parte Greenwood*, L. R. 9 Ch. 511).

Fraudulent preferences by companies.

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3. Reputed ownership (see division of subject, p. 79, *supra*).

### 3. *Reputed Ownership under the Bankruptcy Act.*

The 15th section of the Bankruptcy Act of 1869, so far as relates to reputed ownership, is as follows :—

“The property of the bankrupt divisible amongst his creditors  
\* \* \* shall comprise the following particulars :—

“(3.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance” (*i.e.*, up to the time not of the *close* of the bankruptcy, but of the *discharge*, *Ebbs v. Boulnois*, L. R. 10 Ch. 479).

\* \* \* \* \*

“(5.) All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause.”

Principle of reputed ownership.

The principle embodied in the 5th sub-section, and which is in some form or other contained in a series of statutes beginning with the statute 21 Jac. 1, c. 19, s. 11, is a statutory extension of the doctrine of estoppel or representation, and its object is to protect the general creditors of a trader against the false credit which might be acquired by his being held out as a person of means, through having the possession and power of disposition of property as his own which does not really belong to him. The effect of the enactment in its latest form approximates very closely to the Scotch law of *reputed ownership* in moveables, which the statutory provisions in English law were probably meant to imitate. The eminent jurist and writer upon mercantile law, Professor Bell, speaking from the point of view of a Scottish lawyer, thus states the principle :—

As stated by Professor Bell.

“While it is often necessary that the possession of moveables should be held by persons who have not the



property, personal credit must, in a great degree, depend on the appearance of wealth which a trader is thus enabled to assume. And as, in general, possession of moveables presumes property, and the true owner ought to be aware, that while the power of disposing of his goods remains uncontrolled, or ostensibly so, in another, it may raise a false credit to that other, as if he were proprietor of the effects; so every apparent ownership of moveables, which is either fraudulent, or at least careless or collusive, as not being necessary in the course of honest contracts, should entitle the creditors of the holder to take the subject as if it actually were his property. This rule is admitted both in England and in Scotland, but upon different footings, and to a different extent. In England it is the mere creature of statute; in Scotland it is a rule of the common law, grounded on the principles of equity."

I shall now consider the effect of the statutory enactment, Terms of the enactment. having regard particularly to the more recent decisions. I shall employ, in accordance with a convenient usage, the phrase "reputed ownership" to denote a relation between the bankrupt and goods, fulfilling the conditions described in this clause of the Act.

The term "goods and chattels" must now be taken in connexion with the *proviso* which concludes the section, namely, that "things in action" other than debts due to the trader in the course of his trade or business, are not included. "Goods and chattels." Subject to this proviso, the term applies to every species of property other than an interest in land. Ships are included; but there are special privileges attached to a mortgagor of a ship whose mortgage is duly registered under the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 72. Chattels real are not included; nor are debts secured by mortgage of real estate, though also secured by covenant (Yate Lee on Bankruptcy, p. 139, and cases there cited). Fixtures, which the tenant would, as between himself and the landlord, have the right to remove, but which, according to the strict rules of law already considered

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"Things in  
action."

Whether shares  
in companies  
included in this  
phrase.

(p. 5, *et seq.*, *supra*), are part of the land, are not goods and chattels within the clause; and, although remaining in the possession of the tenant who has mortgaged them, will not pass to his trustee in bankruptcy in competition with the mortgagee (*Horn v. Baker*, 9 East, 215).

"Things in action" is a phrase strictly applicable to rights *in personam* other than rights having an interest in land for their object. The phrase has been sometimes improperly applied indiscriminately to *res incorporales* other than rights relating to land (Williams' Personal Property, p. 4 *et seq.*). But the phrase as used in this section of the Bankruptcy Act, has been strictly construed, and has been held *not* to include shares in companies the legal title to which is capable of transfer (*Ex parte Union Bank of Manchester, In re Jackson*, L. R. 12 Eq. 354); so that where the bankrupt, being the legal owner of the shares, has made an equitable mortgage of them by deposit of the certificates without notice<sup>1</sup> to the company, the shares pass to the trustee by virtue of the reputed ownership. But if the bankrupt has only an equitable interest in such shares (that is to say a mere right *in personam* against the legal owner to make him account for the dividends and transfer when lawfully called on to do so), this is a "thing in action" within the meaning of the proviso (*Ex parte Barry, In re Fox*, L. R. 17 Eq. 113). So that if a shareholder transfers his shares to a mortgagee who is duly registered as owner, and then assigns his right to the shares by way of second mortgage, the second mortgagee will have a good title as against the trustee in bankruptcy of the original shareholder, although no notice of the assignment has been given to the first mortgagee.

<sup>1</sup> As to what is sufficient notice, see *Ex parte Agra Bank, In re Worcester*, L. R. 3 Ch. 555; *Alletson v. Chichester*, L. R. 10 C. P. 319, and cases cited in each; *Ex parte Stewart*, L. T. (N. S.) 554. It is decided by the case last cited, under the old Acts, that a deposit of certificates, with the intention of passing the interest, makes an equitable mortgage, but that notice to the company is necessary and

sufficient to take the transaction out of the order and disposition clause. The other cases show that notice to the directors or secretary need not be given by the mortgagee, or in any formal manner, provided that the matter is brought to the knowledge of the officials of the company in their official character, and in such a manner as to make it their duty to recognise the notice.

Whether a share in an ordinary partnership is a "thing in action" within the meaning of the proviso, is treated by Mr. Lindley (4th Ed., p. 1146, 7), as a question not decided by authority. There is a subsequent decision of Vice-Chancellor Bacon, sitting as Chief Judge in Bankruptcy, to the effect that the right of the executor of a partner (having also the entire beneficial interest in the estate) to realize his testator's share of the partnership assets, is a *chose in action* (*In re Bainbridge, Ex parte Fletcher*, 8 Ch. D. 218). Assuming this decision to be correct, it does not follow that the interest of a partner in the partnership property is a chose in action. As between the partners themselves the right is (to use the language of the civilians) a right *in personam*; as between them and other persons, a right *in rem*. It is not, therefore, according to any strict definition of the term, a thing in action merely. And nothing can be more conducive to the false credit which the statute is intended to prevent, than that a charge should be given by one partner without notice to the others, over his share in the partnership property. If I were to consider the point on principle, I should incline to the view that a partner cannot assign or charge his share in such a manner that the assignee, without giving notice to the other partners, could retain his security against the trustee in bankruptcy.

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Whether a share  
in a partnership  
is a "thing in  
action."

A debenture of a joint-stock company, whereby the Company undertake to pay a certain sum on a fixed day, and give a charge on the property of the company, is a chose in action within the proviso (*In re Pryce, Ex parte Remfrey*, L. R. 4 Ch. D. 685, 25 W. R. 432). So, of course, is a policy of insurance (*Ex parte Ibbetson, In re Moore*, 8 Ch. D. 519).

Examples of  
"things in  
action."

The "commencement of the bankruptcy" is the point of time when the question of reputed ownership arises, and by the 11th section of the Act, this is determined by the completion of the act of bankruptcy on which the adjudication is made, or of a previous act of bankruptcy occurring within twelve months before the adjudication. In the case of a liquidation by arrangement under the Bankruptcy Act, and notwithstanding the provision in a later section (s. 125, subs. 4) to the effect that the *commencement of the liquidation* shall be the date of the

"Commence-  
ment of the  
bankruptcy."

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appointment of the trustee, it appears that the title of the trustee relates back to the first act of bankruptcy within twelve months previous to the appointment of the trustee, that appointment being equivalent to adjudication (s. 125, subs. 7). In other respects the relation back is similar to the relation back in case of an adjudication in bankruptcy (*Ex parte Todhunter, In re Norton*, L. R. 10 Eq. 425; *Ex parte Roche, In re Hall*, L. R. 6 Ch. 795, 799; *Ex parte Eyles, In re Edwards*, L. R. 16 Eq. 99). In the case of liquidation by arrangement, the relation back is subject to the condition that the appointment of a trustee follows the petition for liquidation within six months, otherwise it could not have the effect of an adjudication on the act of bankruptcy involved in the petition (*Ex parte Fenning, In re Wilson and Armstrong*, 3 Ch. D. 455).

“Possession,  
order, or  
disposition, &c.”

“The possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner.” The apparent owner must be one person, the true owner must be another, Parke, B., in (*Load v. Green*, 15 M. & W. 223). It has been accordingly held that in an honest and *bonâ fide* partnership, in which one of the parties is a dormant partner, goods, the property of the partnership and held accordingly in the actual possession of the ostensible partner, are not in the reputed ownership of the latter, and that the interest of the dormant partner in the goods will not pass under this clause of the Act to the trustee under a separate adjudication of bankruptcy against the ostensible partner (*Reynolds v. Bowley*, L. R. 2 Q. B. 474 (Ex. Ch.); *In re Bainbridge, Ex parte Fletcher*, 8 Ch. D. 215). And where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt, it was held that the machinery and trade fixtures in the house where the trade was carried on, which belonged to the landlord and were with his consent in the possession of the firm, did not pass to the trustee in bankruptcy of the adult partner (*Ex parte Dorman, In re Lake*, L. R. 8 Ch. 51). But the principle above stated does not apply to a case where the real owner of property

allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bankruptcy, be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two (*Ex parte Hayman, In re Puleford*, 8 Ch. D. 11). And where the effects of a dissolved partnership have been sold under direction of the Court as a going concern, with liberty to the partners to bid, and one of the quondam partners had accordingly purchased the concern and been let into possession under order of the Court, it was held that on his bankruptcy without payment of the purchase-money the goods belonging to the quondam partnership estate were in his reputed ownership (*Graham v. McCulloch*, L. R. 20 Eq. 397).

It is well settled that where goods are held on a *bond fide* trust they are not in the reputed ownership of the trustee (*Joy v. Campbell*, 1 Sch. & Lef. 328). And the interests of the *beneficiaries* will be protected, although the property held in trust was not of a description authorised by the terms of the trust to be so held. On the bankruptcy (in Sept., 1859) of the chairman of a Railway Company, who with the assent of the directors held in his own name shares in another Railway Company, purchased with the money of the first-named company, it was held that although the shares could not be legally held by the Railway Company, yet they were not in the reputed ownership of the bankrupt, so as to pass to his assignee in bankruptcy, and that he must transfer them as the company should direct (*Great Eastern Railway Co. v. Turner*, L. R. 8 Ch. 149).

Does not apply  
to goods held by  
trustees.

The case is different where a mortgagor of chattels has been allowed to remain in possession. It has been seen that in a *bond fide* mortgage of chattels, the fact of the possession being left with the mortgagor does not raise a presumption of fraud by which the transaction could be avoided under the Statute of Elizabeth. It was for some time a moot point whether the circumstance that the possession was consistent with the deed, by reason of a proviso in the deed for quiet enjoyment for a time by the mortgagor, did not protect the transaction from the operation of the principle of reputed ownership (*Davidson*, Vol. II., p. 714, *note*, 3rd Ed.). That

Does to goods  
left in mortga-  
gor's possession.

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question was set at rest by the case of (*Spackman v. Miller*, 12 C. B. N. S. 659), and, as it was there put by Mr. Justice Willes, "when the mortgagee consents to put himself in a position in which he has no immediate right to the goods, they are in the possession of the mortgagor with the consent of the true owner, and within the reputed ownership of the mortgagor."

Subsequently to the passing of the Bills of Sale Act, 17 & 18 Vict. c. 36, it was sometimes argued that the registration of the Bill of Sale pursuant to the Act gave to the transaction a kind of publicity sufficient to exclude the reputed ownership of the grantor of the bill. But this argument did not prevail; and where a trader remained in possession of goods over which he had given a bill of sale entitling the creditor to take possession upon demand, the goods were held to be, until a demand was made, within the reputed ownership of the grantor of the bill (*Freshney v. Carrick*, 1 H. & N. 653; *Reynolds v. Hall*, 4 Ibid. 519; *Stansfield v. Cubitt*, 2 De G. & J. 222; *Badger v. Shaw*, 2 E. & E. 472; Davidson's Conveyancing, Vol. II., p. 709, 3rd edit.; *Ex parte Harding*, *In re Farebrother*, L. R. 15 Eq. 223). But this is altered by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which enacts (sec. 20) that "chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869."

Not to furniture  
settled by  
marriage  
settlement.

Furniture, which has been assigned to trustees in consideration of the marriage or other valuable consideration for the separate use of the wife, and which is left in the joint occupation of husband and wife in the usual manner, is not in the reputed ownership of the husband (*Ashton v. Blackshaw*, L. R. 9 Eq. 510, 513;<sup>1</sup> *Simmons v. Edwards*, 16 M. & W. 838; *Jarman v. Woolloton*, 3 T. R. 618). And it is apprehended that the same will apply to property declared by the Married Women's

<sup>1</sup> I here refer to the proposition as stated in Mr. Cotton's argument, affording a much more satisfactory ground for disposing of this branch of the case than any-

thing said in the judgment, as to which I can only quote the phrase, "*quandoque bonus dormitat Homerus*."

Property Act, 1870, to be held and settled to the separate use of the wife.

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Reputed ownership is excluded by a *bond fide* demand of the goods by the true owner, or an attempt on the part of the true owner to secure possession, although not successful (*Ex parte Harris, In re Pulling*, L. R. 8 Ch. 48; *Ex parte Ware, Re Courton*, L. R. 8 Ch. 144; *Ex parte Montague, In re O'Brien*, L. R. 1 Ch. D. 554; *In re Elsieck, Ex parte Phillips*, L. R. 4 Ch. D. 496).

The following cases, which I select as among those more recently reported, will further illustrate the criteria of reputed ownership:—

In *Kitchen v. Ibbetson* (L. R. 17 Eq. 46), the holder for value of an unregistered bill of sale of certain goods supplied to an innkeeper for use in his business, allowed them to remain in the hands of his administrator after his death. For fifteen months after taking out administration she continued the business and remained in possession of the goods, at the end of which time she became bankrupt. It was held that the goods were in her reputed ownership.

Various cases  
illustrating the  
doctrine.

In *Ex parte Edey, In re Cuthbertson* (L. R. 19 Eq. 264), the order of events was as follows:—On the 2nd of May a bill of sale, by way of mortgage of chattels, was executed, which was duly registered within twenty-one days. On the 5th of June the goods were seized by the sheriff. On the 13th of June the debtor filed a petition for liquidation by arrangement pursuant to the Bankruptcy Act, under which a trustee was subsequently appointed. On the 15th of June the mortgagee demanded possession. On the 20th the sheriff withdrew. It was held that the sheriff's possession, being wrongful, did not prevent the goods being in the reputed ownership of the debtor, and that, the true owner not having demanded possession until after the act of bankruptcy, the goods passed to the trustee.

Where a Receiver, appointed in an action to enforce specific performance of an agreement to execute a bill of sale of the goods in a public-house, took possession and served the customers, the late proprietor absconding, and the following day filing a petition for liquidation under the Bankruptcy Act, it

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was held that the goods were not in the reputed ownership of the debtor (*Taylor v. Eckersley*, L. R. 5 Ch. D. 740).

The case above cited (*In re Elsieck, Ex parte Phillips*, L. R. 4 Ch. D. 496), was as follows:—The holder of a bill of sale on the goods of a trader in his house and shop, in different streets, instructed his broker to go on the following day to take possession. The broker went accordingly, and commenced making an inventory of the goods in the shop, when he was informed by the debtor that he had that day filed a liquidation petition. He took possession of the furniture some hours later. The inference on these facts was held to be that the consent of the true owner had been withdrawn, and that the reputed ownership did not exist at the time the petition was presented.

In *Ex parte Edey, In re Cuthbertson*, L. R. 19 Eq. 264, the facts were as follows:—On the 2nd of May a bill of sale of chattels was executed, and which was afterwards duly registered. The goods were seized by the sheriff under an execution on the 5th of June, and on the 13th of June the debtor filed a liquidation petition, under which a trustee was appointed. On the 15th of June the bill of sale holder demanded the goods. It was held that the sheriff's possession, being wrongful as against the bill of sale holder, did not prevent the goods from being in the reputed ownership of the debtor at the commencement of the bankruptcy, and that they consequently passed to the trustee.

In *Ex parte Clarke, In re Bell*, 37 L. T. 509, where wheat had been sent on approval to a miller, whose habit it was to grind his own corn, the corn was held by the Chief Judge, Bacon, on the bankruptcy of the miller, to be in his order and disposition. This was in accordance with the case of *Livesey v. Hood*, 2 Camp. 83, where the doctrine was applied to goods sent on sale or return to a retail hosier. As a recent decision of the same judge, applying this principle to the case of a charge given on property remaining on the premises of a manufacturer, I refer to *Ex parte Cohen, Re Cohen*, 38 L. T. 881.

Reputed ownership excluded by notorious custom.

Reputed ownership may be excluded by notorious custom in a particular trade, or by public notice of the nature of the trade carried on sufficient to exclude any probability of credit being given upon the faith of ownership.



Where there is a custom, notorious amongst persons conversant with farming, upon a purchase of live-stock, to leave the animals in the hands of the seller for such convenient time as might be arranged, cattle which had been so left for a time within the custom were held not to be in the reputed ownership of the seller (*Pricstly v. Pratt*, L. R. 2 Ex. 101).

A custom well known in the wine and spirit trade, for goods to remain in the bonded warehouse of the vendor, or in bonded warehouses of other persons, subject to the order of the vendor, in the vendor's name, after they have been paid for by the purchaser, until required by such purchaser for use, was proved in the case of *Ex parte Vaux, In re Couston* (L. R. 9 Ch. 602), and it was held that such custom excluded reputed ownership in butts of whiskey which had been sold by a liquidation debtor, and at the time of the presentation of the petition were lying in the debtor's name in the bonded warehouse of a third party. In a previous case (*Ex parte Watkins, In re Couston*, L. R. 8 Ch. 520), arising out of the same bankruptcy, the goods had been left in the bonded warehouse of the debtor himself, and a delivery warrant had been given to the purchasers. The custom had been also proved in this case, and the reputed ownership was held excluded. The case of *Ex parte Vaux (supra)* shows that, the custom being proved as above, the giving of a delivery warrant is immaterial; and it is indifferent whether the bonded warehouse is that of the debtor himself or of a third person.

And where goods are consigned by manufacturers to persons who act as mere agents for their sale, and describe themselves, on a brass plate affixed to their place of business, and also upon their invoices, as "merchants' and manufacturers' agents," it was held by the Master of the Rolls (Jessel) that reputed ownership was excluded in regard to manufacturers' goods sent to them for sale (*Ex parte Bright, In re Smith*, 10 Ch. D. 566). And in the subsequent case of *Ex parte Wingfield, In re Florence* (10 Ch. D. 591), the Master of the Rolls gave a similar decision in regard to horses which were in the possession of the bankrupt, a small horse dealer, on a contract of sale or return, there being evidence, which the Master of the Rolls deemed sufficient, of a notorious custom in the trade to send out horses on these terms.

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It has been decided that an unfinished ship remaining in the hands of the builder under a special contract, whereby the *property* has already passed to the purchaser, is not in the reputed ownership of the builder (*Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 A. & E. 448, 472). It was observed that the ship was, under such circumstances, not in the possession, order, or disposition of the builder any more than a vessel or other articles sent to a builder or manufacturer to be repaired. It would, at all events in the present day, be a sufficient ground for such a decision, to say that special contracts of this kind are so universal in the ship-building trade, that no false credit can arise on the strength of the actual possession of the ship by the builder. And the same will doubtless apply to all materials identifiable as destined for the ship, and which, by the terms of the special contract, may have become the property of the purchaser.

Is there any  
such custom in  
the furniture  
trade?

It has been attempted to exclude reputed ownership by alleging a custom of supplying furniture on what is called a "hiring agreement." There is a reported case (*Ex parte Powell, Re Matthews*, 24 W. R. 378, 1 Ch. D. 501) in which the attempt succeeded, but this cannot be relied on as a case in which the custom was proved. The trustee in bankruptcy, not having sufficient assets to contest the question, declined an issue; and under these circumstances the uncontradicted evidence of certain furniture dealers (who were not cross-examined) before the judge of the County Court, of the existence and notoriety of the custom, was held sufficient. The question was again mooted in the Court of Appeal in the case of *Ex parte Crawcour & Co.* (26 W. R. 733; 9 Ch. D. 419). By the agreement in that case the furniture was to become the property of the hirer upon the payment of the full amount of £66, which was to be paid in certain instalments. The registrar held the agreement to be a bill of sale by the hirer, and void against the trustee in bankruptcy for want of registration. This was of course wrong, as the furniture had never become the property of the hirer. The appeal was consequently allowed, and the case referred back to the registrar to try the question of reputed ownership. The decision of Mr. Justice Berwick, in an Irish case in 1860 (*Re Hume*, 10 Ir. Ch. 100), was to the effect that such a custom

was not established to contradict the reputed ownership; and a similar decision was given on the equity side in the case of a billiard table, a custom having been alleged for manufacturers to send out tables on the hiring system (*In re Shaw*, Ir. Rep. 11 Eq. 632). In a case where a tradesman sold his household furniture to a furniture dealer, and hired it back at 12s. 6d. a week, the goods were held to be in the reputed ownership of the former (*Ex parte Lovering, In re Jones* (No. 2), L. R. 9 Ch. 621).

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The system adopted in the music trade of letting pianos on hire is so general, as probably to amount to a custom that will exclude reputed ownership. In a case before the Chief Judge in Bankruptcy the custom of letting pianos on what is called "the three years' system" was proved to be established, so that the ordinary creditors of a bankrupt must be reasonably presumed to have known it, and it was held good accordingly (*In re Blanshard, Ex parte Hattersley*, 8 Ch. D. 601).

It is to be observed that the fact of the debtor being a "trader" is still important with regard to this section of the Act. The schedule contains a list of certain classes of "traders," but also provides that "a farmer, grazier, common labourer, or workman for hire, shall not, nor shall a member of any partnership, association, or company, which cannot be adjudged bankrupt under this Act, be deemed as such a trader for the purposes of this Act."

Reputed ownership clause applies to "traders" only. Who is a "trader?"

Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally to get his living in that manner, Yate Lee, ed. 1871, p. 488 (*Ex parte Paterson*, 1 Ro. 402; *Newland v. Bell*, Holt, 221; *Ex parte Lavender*, 4 Dea. & C. 487). For the detail of decisions upon who are traders, I refer to the special treatises on Bankruptcy.

I have already adverted to the proviso regarding things in action, and now revert to the exception from that proviso, namely, "debts due" to the bankrupt "in the course of his trade or business." Such debts remain subject to the rule of reputed ownership. In regard to these debts, therefore, it is

"Debts due to the bankrupt in the course of his trade or business" excepted from the proviso.

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§ 3.

In such cases  
notice necessary  
to determine  
reputed  
ownership.  
Notice, how  
given.

still important to consider the question, when there is an assignment of the debt, what notice of the assignment is necessary to determine the reputed ownership of the original creditor.

Where the debtor is a company, it is not sufficient that the secretary or directors had some casual notice or knowledge of the fact of the assignment; the principle is that notice, although it need not be given formally, must be given to some official of the company in such a manner that it becomes his duty to see that the notice is recorded and acted on (*Edwards v. Martin*, L. R. 1 Eq. 121; *Lloyd v. Banks*, L. R. 3 Ch. 448; *Ex parte Agra Bank*, L. R. 3 Ch. 555; *Alletson v. Chichester*, L. R. 10 C. P. 319).

The notice, in order to bar reputed ownership, must of course be given before the adjudication of bankruptcy (*Ex parte Caldwell, In re Currie*, L. R. 13 Eq. 188), and before any act of bankruptcy to which the title of the trader relates back, and of which the person relying on the assignment had notice at the time of that transaction (*Lees v. Whiteley*, L. R. 2 Eq. 143).

Where a security is given by deposit of a document or instrument of obligation, *e.g.*, a policy of assurance, it has been decided that the question whether notice is necessary in order to prevent reputed ownership, depends on whether the intention of the transaction is to transfer an interest in the debt, or only to give a dry lien upon the document or instrument. In the former case notice has been held necessary (*Green v. Ingham*, L. R. 2 C. P. 525); in the latter, unnecessary (*Gibson v. Overbury*, 7 M. & W. 555).

The principle is that where the interest in a chose in action is intended to be transferred, the consent of the transferee to any power of disposition remaining in the transferor is withdrawn by notice to the debtor in the obligation, and the neglect to give notice is evidence of consent by the true owner, the transferee, to such power of disposition remaining in the transferor (*Ex parte Stewart*, 11 L. T. N. S. 554).

What is a "debt  
due, &c.?"

A. was a contractor for the supply of meat to an asylum. He assigned the contract to B., who supplied the meat in A.'s name. On the bankruptcy of A. it was held that the debt of the asylum then due for meat supplied, being a debt due to A. in the

course of his business, and the asylum having no notice of the arrangement between A. and B., which was virtually an assignment of the debt to B., was in the reputed ownership of A. (*Cooke v. Hemming*, L. R. 3 C. P. 334). This was the decision of the majority (*Bovill, Byles and Keating*), but it was dissented from by *Willes* on the ground that B. having supplied his own meat was the real creditor for its price; A. being merely a trustee for him, and never having been the real creditor upon the debt due for the goods so supplied. It is proper to add that the case was ultimately compromised, so that the decision of the majority was not acquiesced in, and I am inclined to think Mr. Justice *Willes*' view of the transaction was the correct one.

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It has been decided that "debts due" in this clause is not to be confined to debts actually payable at the time of the bankruptcy, and on the other hand, it is not to be extended to obligations which are merely contingent. "Marginal notes" given by bankers, admitting themselves accountable for certain sums on receipt of advice of the due payment of certain bills, have been construed to belong to the class of contingent obligations, and not within the exception as to "debts due" in the course of business (*Ex parte Kemp, In re Fastnedge*, L. R. 9 Ch. 383).

I have already (p. 92, *supra*) adverted to the doctrine of *reputed ownership* which exists independently of statute by the law of Scotland. I shall now advert to a decision of the Court of Session in Scotland (*Edmond v. Mowat*, reported 7 McPherson, 59), which affords a particularly good illustration of that doctrine.

Reputed ownership by Scotch law.  
Illustrated by *Edmond v. Mowat*.

A., a proprietor of bathing machines on the shore at Aberdeen, entered, in Nov., 1847, into a transaction with his father-in-law (B.), purporting to be a sale by A. to B. of his bathing machines and the appurtenances (called "the bathing establishment") for the price of £100. In March, 1848, the estate of A. was sequestrated under the Bankruptcy Act (Scotland), 1856. In February, 1849, B. executed a deed transferring the "bathing establishment" to C. (A.'s father), in consideration of the latter having advanced the money to pay the original price. C. died in 1853

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having, by a testamentary deed, bequeathed the "bathing establishment" to D. (a son of A., then a young boy), declaring that the same should be managed for D.'s behoof during his minority, by A. Neither the purported sale to the father-in-law (B.), nor the transfer to the father (C.) was ever followed by delivery, but the bathing establishment remained in the possession and management of A. Various steps having been taken in the sequestration, the sheriff, in February, 1855, pronounced an order discharging the bankrupt (A.) of all debts and obligations contracted by him or for which he was liable at the date of the sequestration. After his discharge A. engaged anew in business and died in February, 1867, having all along continued in the possession and management of the bathing establishment, and being, from the time of his discharge, believed and reputed to be the owner of it by those with whom he dealt and by the public at large. On the 1st of March, 1867, the estates of A. (then deceased) were anew sequestrated under the Bankruptcy Act. The Court decided that, under these circumstances, the title of the trustee in the second bankruptcy to the bathing establishment, prevailed in competition against D., who claimed it under his grandfather (C.'s) bequest.

In Scotland, in goods sold but not delivered, the true ownership remains with the seller.

The legal effect of the transactions above mentioned was, according to the view taken by the Court, the following:— Assuming the *bona fides* of the sale in 1847, it was, not having been followed by delivery, a mere personal contract, and A. was, at the date of his sequestration in March, 1848, undivested owner of the bathing establishment, which was clearly *moveable* property, or, as we should say, a *mere chattel*. By the confirmation of the trustee in the sequestration, A. became divested of the property in favour of the trustee. When the bankrupt received his discharge in 1855, he did not thereby become revested in this property; but he acquired the capacity to acquire property, and therefore the bathing establishment being still left in his uncontrolled possession, with no apparent right in any one else, was in a condition to raise a reputed ownership; and the repute thus raised being undisturbed until his death, must receive effect in the ensuing sequestration.

Effect of  
Mercantile Law

The question was mooted what would have been the effect, in case A. had not been divested of the property by the first

sequestration, of the Mercantile Law Amendment Act (Scotland), 1856, which (section 1) enacts that "where goods have been sold but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same." It had been decided that, notwithstanding the Mercantile Law Amendment Act, it is still the law in Scotland that the property in goods sold and undelivered remains in the seller (*Wyper v. Harvey*, 23 D. 606): and further that the possession of goods left with the seller so as to leave him in the full enjoyment and use of them, is not a mere "custody" within the meaning of the Act (*Sim v. Grant*, 24 D. 1033). Probably in every case where goods sold are left with the seller under such circumstances as would raise *reputed ownership* in England, it will be correct to say that by Scotch law the true ownership is in the seller; and his possession not being a mere "custody" within the statute, the rights of the creditors are unaffected by the Act.

It seems therefore that in Scotland the common law will in all cases afford to creditors the protection which in England is given by the reputed ownership clause of the Bankruptcy Act, as well as by the Bills of Sale Act (to be presently considered); and this protection is not, in regard to reputed ownership, confined to the creditors in bankruptcy, but extends to the ordinary execution creditor as well (7 McPh. 62 *note*).

In a question under the English statute the reputed ownership at the time of the bankruptcy is immaterial, if the trustee under that bankruptcy disclaims interest in the goods (*Meggy v. Imperial Discount Co.*, 26 W. R. 342, 3 Q. B. D. 711). In this case the trustee in a liquidation, on the joint petition of B. & S., by the instructions of B.'s separate creditors, left B.'s household furniture in his possession, not to be realized until further orders. Subsequently B. mortgaged the furniture, and again became a liquidating debtor. At the time of filing the second petition the mortgagee had taken possession of the

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Amendment Act  
(Scotland), 1856.

General result in Scotland, that creditor is protected without express legislation.

In England reputed ownership immaterial, if trustee in bankruptcy disclaims.

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goods, so that the trustee in the second liquidation could not have maintained a title by reputed ownership. He disclaimed, and the question was between the mortgagee who had taken possession and the trustee in the former liquidation. It was argued that the trustee was estopped against the mortgagee, by having represented the debtor as the owner of the furniture. But it was held that, in the absence of any proof that the trustee or the creditors he represented knew that the debtor was employing his furniture as a means of raising money, the doctrine of estoppel did not apply. It is to be observed that there was no question here of the creditors generally being deceived by a false appearance of wealth; and the reasoning of the judges in the Court of Appeal would apply to a question of Scotch, as well as of English law.

4. *Questions under the Bills of Sale Act.*

4. Bills of Sale Acts, see division of subject, p. 79, *supra*.

The first Bills of Sale Act, 17 & 18 Vict. c. 36.

4. I shall now consider the questions arising under the Bills of Sale Acts. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), formally repeals the prior Acts, except as regards bills of sale executed before the 1st of January, 1879. In order, however, to describe the effect of legislation and decisions on the subject it is necessary to advert to the original Bills of Sale Act, namely the Act 17 & 18 Vict. c. 36, the object of which, as stated in the preamble, was to provide a remedy against frauds upon creditors "by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." This preamble, although giving the key to the principle of both Acts, is not expressly re-stated in the new Act, which simply proceeds on the preamble that "it is expedient to consolidate and amend the law relating to bills of sale of personal chattels."

I shall here state briefly the principal enactments contained in the Act of 1878, and note in passing the provisions which are new; and where I set out a section of the Act at length, I shall mark the new clauses by the use of italics.



The Bills of Sale Act, 1878, came into operation (sec. 2) on the 1st of January, 1879, and (sec. 3) applies to every bill of sale executed on or after that date (whether the same be absolute or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

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The Bills of Sale  
Act, 1878, 41 &  
42 Vict. c. 31.

By the 4th section the following construction is put upon the leading terms of the Act :—

“ The expression ‘ bill of sale ’ shall include bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods,*<sup>1</sup> and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, *and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred,* but shall not include the following documents ; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship<sup>2</sup> or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India

<sup>1</sup> These words appear to have been suggested by a class of cases of which *Allsop v. Day* (7 H. & N. 437) is the leading authority. Subsequent cases before the new Act came into operation are *Ex parte Cooper*, *In re Baum* (10 Ch. D. 313); and *Woodgate v. Godfrey* (5 Ex. D. 24). The effective operation of these words in the new statute (if any) is, by the decision

of the Court of Appeal in *Marsden v. Meadows* (7 Q. B. D. 80) very limited.

<sup>2</sup> An assignment of a ship built for a foreign government, and which could not be registered as a British ship under the Merchant Shipping Act, 1854, comes within the exception (*Union Bank of London v. Lenanton*, 3 C. P. D. 243.)

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warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented :

"The expression 'personal chattels' shall mean goods, furniture,<sup>1</sup> and other articles capable of complete transfer by delivery, *and (when separately assigned or charged) fixtures and growing crops*, but shall not include chattel interests in real estate, *nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow*, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale :

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

It has been held that a clause in a building agreement whereby in case of the builder's default the landowner may

<sup>1</sup> The Act 16 & 17 Vict. c. 36, here added "fixtures," without any qualification.

re-enter upon the premises, and that on such re-entry all materials then on and about the premises shall be forfeited to and become the property of the landowner, does not constitute a bill of sale within the Act, inasmuch as although it is a licence to take possession of personal chattels, the possession is not to be taken "as security for any debt" (*Ex parte Newitt, In re Garrud*, 16 Ch. D. 522).

By the 5th section (which is new), the expression "personal chattels" is further defined as comprising *trade machinery*, that is to say the machinery in any factory or workshop exclusive of (1st) the fixed motive powers, such as waterwheels and steam-engines, &c.; (2ndly) the fixed power machinery, such as shafts, wheels, &c., which transmit the action of the motive powers; and (3rdly) the pipes for steam, gas, and water.

By the 6th section (which is also new), every instrument, not being a mining lease, whereby a power of distress is given by way of security for a debt, shall be deemed a bill of sale of any personal chattels which may be seized under such power of distress; but it is provided that this enactment is not to extend to a mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent. This enactment, as far as relates to mortgages, only deals with transactions which, independently of this Act, have been held to be void as frauds upon the bankrupt law (*Ex parte Williams, In re Thompson*, 7 Ch. D. 138: *Ex parte Jackson, In re Bowes*, 14 Ch. D. 725; and compare *In re Stockton Iron Furnace Co.*, 335, 353).

By the 7th section (which is new, and made retrospective) it is provided that no fixtures or growing crops shall be deemed to be separately assigned or charged, by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in

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the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person. The effect of this section has already been explained (p. 21, *ante*).

The 8th section, which is substituted for the 1st section of the original Act, but simplified by leaving definition and machinery to be dealt with in separate sections of the Act, is as follows :—

“Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within *seven*<sup>1</sup> days after the making or giving thereof, *and shall set forth the consideration for which such bill of sale was given*, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs’ officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void<sup>2</sup> so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time<sup>3</sup> *of filing the petition for bankruptcy or liquidation*, or of the execution of such assign-

<sup>1</sup> The period allowed by the former Act was 21 days.

<sup>2</sup> In the former Act the words are “shall be null and void to all intents and purposes whatsoever.” But as the avoidance was expressly made *as against* certain classes of persons, these words were simply unmeaning.

<sup>3</sup> Under the former Act the criterion was the “time of bankruptcy,” which meant the commission of the act of bankruptcy to which the title of the trustee, assignee, or trustee in bankruptcy would relate back (*In re Turner*, *Ex parte Attwater*, 25 W. R. 206).

ment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

The new requirement as to setting forth the consideration, is strictly construed by the Chief Judge (Bacon) in the case of *Ex parte Carter, In re Threappleton* (12 Ch. D. 908). But in *Hamlyn v. Betteley* (5 C. P. D. 327), it was held by the Common Pleas Division that, if the real consideration is disclosed it is not necessary to set forth all the circumstances attending the transaction; and the recital that the consideration money was "now paid to" the grantor, was held warranted by the fact that it was partly made up of various sums paid at his request to other creditors. It may be doubted whether the two cases here cited are consistent in principle. In *Ex parte Charing Cross, &c. Bank, In re Parkes* (16 Ch. D. 35), where the consideration was stated to be for £120 paid to the mortgagor at or before the execution, the fact being that only £90 was advanced and the remaining £30 retained for interest and expenses, the Court of Appeal decided that the bill of sale was void against the trustee in bankruptcy. (See also *Hamilton v. Chainé*, 7 Q. B. D. 1). But the Court of Appeal have also decided that it is unnecessary to set forth a collateral agreement as to the application of the consideration money (*Ex parte National Mercantile Bank, In re Haynes*, 15 Ch. D. 42); or the fact that part of the consideration money has been retained for the solicitor's costs and valuer's fee actually due (*Ex parte Challinor, In re Rogers*, 16 Ch. D. 260). They have also decided that where accounts were stated between a debtor and creditor and a bill of sale given for the balance made payable with interest on demand by a notice in writing, the consideration was substantially and "truly" within the meaning of the Act, set forth by the words "in consideration of £                      now paid." (*Credit Co. v. Pott*, 6 Q. B. D. 295).

The 9th section is directed against a practice by which the

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former Act was often evaded, of avoiding registration by making successive bills of sale, each within the period allowed for registration of the prior bill. Any subsequent bill of sale executed within the seven days and given as a security for the same debt as the prior bill, is declared void.

The 10th section is as follows :—

“A bill of sale shall be attested and registered under this Act in the following manner :—

“(1.) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor :*

“(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed :

“(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and

shall be truly set forth in the copy filed under this Act therewith and as part hereof, otherwise the registration shall be void.

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*“ In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.*

*“ A transfer or assignment of a registered bill of sale need not be registered.”*

Upon the 1st sub-section it was held in the Common Pleas Division by Lord Coleridge and Mr. Justice Lindley (though with some hesitation on the part of the latter), that the terms of the enactment being imperative and for the protection of grantors from fraud, a bill of sale made since the Act and not attested according to its provisions is void even *as between the parties* to it (*Davis v. Goodman*, 5 C. P. D. 20). But this decision was reversed by the Court of Appeal (5 C. P. D. 128), holding these provisions of section 10 to be merely explanatory of the requirements of section 8, which are sanctioned by nullity *as against creditors only*. In *Ex parte National Mercantile Bank, In re Haynes* (15 Ch. D. 42), it is held that, if the attestation states (as directed by the Act), that the effect of the bill has been explained to the grantors, it is no objection to the validity of the bill of sale that no such explanation had in fact been made.

In regard to the 2nd sub-section, the cases as to the sufficiency of the description of the residence and occupation of the grantor and attesting witnesses, to satisfy the requirements now contained in this sub-section, are numerous. The principle is stated by Blackburn, J., in *Larchin v. North-Western Deposit Bank* (L. R. 10 Ex. 64), as follows:—“The object of the Act is to give notice to all who are likely to deal with the grantor of the bill of sale; not to enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale.” This statement is endorsed by Lord Coleridge, C.J., in *Murray v. Mackenzie* (L. R. 10 C. P. 628). I shall now refer briefly to the cases.

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In the following, the requirements of the statute have been held to be not satisfied:—*Hatton v. English*, 7 E. & N. 280; *Allen v. Thompson*, 1 H. & N. 15; *Tuton v. Sanoner*, 1 H. & N. 280; *Pickard v. Bretz*, 5 H. & N. 9; *Dryden v. Hope*, T. N. S. 280; *Beales v. Tennant*, 29 L. J. Q. B. 188; *Adams v. Graham*, 33 L. J. Q. B. 71, 12 W. R. 282; *Ex parte Hood*, *In re Vining*, L. R. 10 Eq. 63; *Brodrick v. Scalé*, L. R. 10 P. 98. All these turned upon an entire omission of description of the occupation, or (what comes to the same thing) description of a person who has an occupation as “gentleman” or “esquire” only. *In re Harris*, 10 Ir. Ch. Rep. 100, the description “City of Cork, law clerk,” was held insufficient. The following were cases of misdescription: *Larchin v. North-Western Deposit Bank*, L. R. 8 Ex. 80, and 10 Ex. 64 (Ex. Ch.); *Ray v. McKenzie*, L. R. 10 C. P. 625. In *Picard v. Martin*, 24 W. R. 886, it was held that, where there were two attesting witnesses the affidavit must give the descriptions of both. In *Castle v. Downton*, 5 C. P. D. 56, the affidavit stating the grantor was “until lately” a commercial traveller, was held insufficient as a description of his occupation.

In the following, the requirements have been held satisfied:—*Attenborough v. Thompson*, 2 H. & N. 559 (place of business equivalent to “residence”); *Blackwell v. England* (same principle), 8 E. & B. 541; *Sutton v. Bath*<sup>1</sup> (“gentleman”), 3 H. & N. 798; *Morewood v. South Yorkshire and River Dun Co.* (“gentleman”), 3 H. & N. 798; *Routh v. Roublot*, 1 E. & E. 850 (identification of attesting witness); *Jones v. Harris*, L. R. 7 Q. B. 268 (identification of place of residence by reference to copy of bill of sale); *Banbury v. White*, 2 H. & C. 300 (incorporation of express reference of description in bill of sale); *Foully v. Taylor* (same principle), 5 H. & N. 202; *Hewer v. Cox* (same principle), 3 E. & E. 428; *Briggs v. Boss*, L. R. 10 B. 268 (“accountant,” but *quære* overruled by *Larchin*

<sup>1</sup> In *Sutton v. Bath* the statement in the rubric is to the effect that the burden of proof of an occupation lies upon the party seeking to impeach the bill of sale. This is observed in *Castle v. Downton*, 5 C. P. D. 57, to be without founda-

tion. In fact, there was in *Sutton v. Bath*, evidence that the grantor had, at the time of the transaction, no occupation, although he was reduced to shifts which made him a “doubtful gentleman.”



*North-Western Deposit Bank*, L. R. 10 Ex. 64, *supr. cit.*); *Gardnor v. Shaw* (clerical error, misspelling of name), 24 L. T. N. S. 319; *Grant v. Shaw*, L. R. 7 Q. B. 700 ("government clerk"); *Smith v. Cheese* ("gentleman"), 1 C. P. D. 60; *Lamb v. Bruce* (clerical error in date), 24 W. R. 645; *Corbett v. Rowe* (error in Christian name), 25 W. R. 59; *Ex parte National Deposit Bank, In re Wells* ("foreman tailor's cutter" who also took in lodgers), 26 W. R. 624; *Blount v. Harris* (*falsa demonstratio*, "Acton, City of London"), 27 W. R. 202 (C. A.); *Ex parte McHattie, In re Wood*, 10 Ch. D. 398 (*falsa demonstratio* and omission of a christian name).

In *Button v. Neil* (4 C. P. D. 354), it was held, contrary to the decision sixteen years previously (which it appears had not been followed by the practice), in *London and Westminster Loan Co. v. Chace* (12 C. B. N. S. 730), that the time to which the description in the affidavit ought to relate is the time of registration and not of executing the bill of sale.

It was held under the former Act that the production of a bill of sale with certificate upon it that "a document purporting to be a copy of a bill of sale, dated, &c., indorsed with the above names, was registered, &c.," was no evidence that an affidavit had been filed complying with the requirements of the statute (*Mason v. Wood*, 1 C. P. D. 63; see also *Halkett v. Emmott*, 47 L. J. Q. B. 436; 20 W. R. 632). It was, however, sufficient to produce a certified copy of the filed documents, including the affidavit, as well as of the entry in the office book of the filing (*Grindell v. Brandon*, 6 C. B. N. S. 698; *Bath v. Sutton*, 27 L. J. Ex. 388). The requirements for *prima facie* evidence are now simplified by section 16 of the Act of 1878. (See p. 118, *post.*)

Where there is an instrument combining a transfer of a bill of sale with a further charge, it has been held by the Court of Appeal that the instrument is, without registration as a new bill of sale, effectual as a transfer, to the extent, at least, of the amount remaining due on the original bill of sale (*Horne v. Hughes*, 6 Q. B. D. 676).

The 3rd sub-section is substantially a re-enactment of section 2 of the former Act. Under that section it was held that a parol agreement previous to the making of the bill of

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sale, that the price mentioned in the bill of sale should be payable by weekly instalments, was a condition within the meaning of the section (*Ex parte Southam, In re Southam*, L. R. 17 Eq. 578). But a memorandum merely stipulating for something which may make the position of the grantor more onerous than appears by the bill of sale itself, is not such a condition (*Ex parte Collins, In re Lees*, L. R. 10 Ch. 367). The condition or declaration of trust pointed at, is a trust in favour of the grantor, and does not apply to a trust in favour of a third party (*Robinson v. Collingwood*, 13 W. R. 84).

The clause of this section relating to priorities is co-ordinate with and not subordinate to the first clause, and does not relate back to section 8; so that priorities between two bills of sale depend on the date of registration, whether there is or is not a competing title of an execution creditor or trustee in bankruptcy (*Conelly v. Steer*, C. A., from Q. B. Div., Mar. 19, 1881, overruling *Lyons v. Tucker*, 6 Q. B. D. 660).

Section 11 provides for the renewal of the registration every five years; and section 12 makes provision as to the form of the register and the index of names to be kept by the registrar.

Sections 14 and 15 make provisions for the rectification of the register in regard to mistakes through inadvertence; and for entry of a memorandum of satisfaction.

Section 16 provides, amongst other things, that any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall be *prima facie* evidence thereof, and of the fact and date of registration as shown thereon.

The remaining sections relate to machinery; with the exception of section 20, which enacts as follows:—"Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869." This is an important change in the law, and renders the security afforded by a registered bill of sale much more trustworthy than formerly.

The Act (sec. 24), like its predecessor, does not extend to Scotland or Ireland. As to Scotland, indeed, an Act of this

nature was unnecessary, 1st, because, in Scotland, the doctrine of reputed ownership exists independently of statute, and requires the active intervention (and not merely the withdrawal of consent) of the true owner to put an end to the presumption in the creditor's favour; and, 2ndly, by reason of the principle that possession is necessary to transfer the ownership in moveables (Bell's Commentaries, Shaw's Ed. pp. 518, 519, and see pp. 118, 132, *supra*).

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A curious effect of the Act not applying to Scotland, if the decision of V.-C. Bacon in *Coote v. Jecks*, L. R. 13 Eq. 597, is correct, is that a security given by one English trader to another over goods in Scotland is effectual, although unregistered, against the trustee in bankruptcy of the debtor. V.-C. Bacon construed the Act to mean that a bill of sale of personal property situate in Scotland is not within the purview of the Act. This is an anomaly which would be best met by extending in its entirety the Scotch law, so far as relates to the property in goods assigned *by way of security*, to all parts of the United Kingdom.

The decisions under the first Bills of Sale Act (17 & 18 Vict. c. 36), so far as they relate to enactments and expressions which are embodied in the last Act (41 & 42 Vict. c. 31), are of course applicable to the construction of that Act. Amongst the decisions the most important are those which relate to the nature of the acts necessary on the part of the grantee to take the goods out of the "apparent possession" of the maker or giver of the bill of sale.

Decisions upon  
the first Bills of  
Sale Act (17 &  
18 Vict. c. 36).

It is to be observed that "apparent possession" is distinguishable from reputed ownership in two ways.—For, *first*, in order to exclude reputed ownership, a friendly possession, provided it is effectual so as to prevent the debtor disposing of the goods, is sufficient. But to exclude the "apparent possession" of the former owner the possession of the new owner must be *apparent*, *i.e.*, complete and notorious as well as real (*Ex parte National Assurance Co., In re Francis*, 10 Ch. D. 408; *Ex parte Jay, In re Blenkhorn*, L. R. 9 Ch. 697). *Secondly*, reputed ownership is excluded by an attempt, though unsuccessful, by

"Apparent possession" distinguished from reputed ownership.

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Cases as to the  
meaning of  
"apparent  
possession."

the real owner, to get possession; which is not the case with "apparent possession." These distinctions will further appear from the cases cited in the paragraphs immediately following.

Where the goods are in a house not resided in by the giver of the bill of sale, and the grantee has handed to him the key of the rooms where the goods are, and actually enters and puts his name on some of the goods, it has been held that the premises are not "occupied" by the former within the meaning of the construction clause of the Act. It was considered enough that his occupation *de facto* had ceased, and the facts were held sufficient to put an end to his apparent possession of the goods (*Robinson v. Briggs*, L. R. 6 Ex. 1). So goods in a furnished house which at the time of the bankruptcy is in the occupation of a third party as tenant of the debtor (*Ex parte Morison, In re Westray*, 28 W. R. 524), and agricultural implements which have been let by the debtor on hire (*Lincoln Waggon Co. v. Mumford*, 41 L. T. N. S. 655), are not in the "apparent possession" of the debtor.

But in a case where the grantee of the bill of sale failed to get access to the goods by reason of the owner of the house where they are refusing to admit him, it was held by the Court of Appeal (reversing the decision of the Exchequer Division "that the goods remained in the apparent possession of the giver of the bill of sale" (*Ancona v. Rogers*, L. R. 1 Ex. D. 285).<sup>1</sup> In this case the grantor of the bill of sale had, with the permission of the owner of a country house, placed his furniture and goods in four vacant rooms, which he locked up, taking the key with him. These facts were construed by the Court of Appeal as delivery of the use of the rooms by the owner of the house to the giver of the bill of sale, and not as a delivery of the goods by the latter to the former. But even on the latter hypothesis

<sup>1</sup> In the case of *Furber v. Finlayson*, 24 W. R. 370, before the Common Pleas Division a short time previously to the decision of the Exchequer Division in *Ancona v. Rogers*, the facts were that the clerk sent by the bill of sale holder got into a part of the house where he could see the rooms where the goods were, but could not get into

the rooms. A jury having found that the man *bonâ fide* intended to take possession, the Common Pleas Division gave effect to the title of the holder of the bill of sale. The *ratio decidendi* of this decision appears, however, to be overruled by the decision of the Court of Appeal in *Ancona v. Rogers*.

it was held that the owner of the house would have had possession of the goods as bailee for the giver of the bill of sale, and his refusal (although wrongful) to deliver up possession prevented the apparent possession of the giver of the bill of sale from being determined. This case is very instructive as to the distinction between "apparent possession" within the Bills of Sale Act, and reputed ownership under the Bankruptcy Act. It is clear that under the circumstances *reputed ownership* would have been at an end. For by the demand of possession from the true owner, though uncomplied with, the goods would no longer have remained in the order and disposition of the bankrupt "with consent of the true owner" (see *Ex parte Ward, Re Couston*, L. R. 3 Ch. 144, and other cases cited, p. 99, *ante*). It is also the opinion of the Court of Appeal in *Ancona v. Rogers* that furniture which has been delivered by the debtor into the custody of a bailee to keep under his orders, is within his possession or apparent possession within the meaning of the Act.

It will be remembered (see p. 98, *supra*) that furniture settled as the separate property of the wife is not within the reputed ownership of the husband though in his house. But if assigned by the husband who was previously completely owner of the furniture, remaining in his house has been held to be in his "apparent possession" within the meaning of the Bills of Sale Act (*Fowler v. Foster*, 28 L. J. Q. B. 210; *Ashton v. Blackshaw*, L. R. 9 Eq. 510).

In *Pickard v. Marriage* (L. R. 1 Ex. D. 364; 24 W. R. 886) the execution debtor was manager of a dairy farm belonging to the plaintiff, and, as part of his wages, occupied a dairy farm belonging to the plaintiff, and to which the debtor had removed his own furniture. The plaintiff made him a loan on a bill of sale of the furniture, which remained on the dairy premises. The bill of sale contained a stipulation that the grantor was to have the possession and use of the furniture so long as the grantee should think fit; and the grantor paid a nominal rent for such use. The bill of sale being imperfectly registered, it was held unavailing against the execution creditor.

The meaning given to "apparent possession" under the interpretation clause of the statute (section 4) is very extensive, "Apparent possession" as expressly denne

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in the interpretation clause  
(sec. 4) of  
the Act.

but in applying the wide terms of this clause, regard is had to the general scope and purpose of the Act. The mere fact of the goods remaining in or upon the debtor's house and premises will not invalidate an unregistered bill of sale, if possession is taken which is not merely formal, but actual, complete, and notorious. Thus where the grantee of a bill of sale takes possession of the goods and advertises them for sale *as the goods of the giver of the bill sold under a bill of sale*, sufficient is done to take the goods out of his "apparent possession" within the Act, although the goods still remain in the house of the debtor (*Emmanuel v. Bridges*, L. R. 9 Q. B. 287; compare *Gough v. Everard*, 2 H. & C. 1; *Smith v. Wall*, 18 L. T. N. S. 182). So where a receiver appointed under authority of the Court in an action for specific performance of an agreement to execute a bill of sale, takes possession of the goods in a public-house and serves the customers, the proprietor meantime absconding, there is no apparent possession of the late proprietor, even if the Bills of Sale Act would otherwise have applied to the case (*Taylor v. Eckersley*, L. R. 5 Ch. D. 740).<sup>1</sup> But it is not sufficient to send in broker's men who remain in the house without in any way interfering with the use of the furniture by the giver of the bill of sale and his family, who continue to use it as before (*Ex parte Jay, In re Blenkhorn*, L. R. 9 Ch. 697; *Ex parte Hooman, In re Vining*, L. R. 10 Eq. 63). Nor will it be sufficient if in addition to the broker's man being in the house, placards are posted announcing a sale of the furniture, there being nothing in the placards to show that the sale is not made by the maker of the bill of sale himself (*Ex parte Lewis, In re Henderson*, L. R. 6 Ch. 627). Nor is it of any avail to placard a house with notices that possession has been taken, if possession has *de facto* not been taken (*Re Henley, Ex parte Fletcher*, 5 Ch. D. 809). But actual visible possession by a sheriff's officer excludes the apparent possession of the debtor (*Ex parte Saffery, In re Brenner*, 16 Ch. D. 668). And when possession is taken by broker's men under a bill of sale, as soon as a commencement is made of packing up and

<sup>1</sup> This case is also reported on receiver, 2 Ch. D. 302.  
the appointment of an interim

carrying away the goods, the apparent possession is determined (*Ex parte Jay, In re Blenkhorn*, L. R. 9 Ch. 697).

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The "time of such bankruptcy," which is the criterion of the period to which the apparent possession in question is referred, has been construed to mean the time of the commission of an act of bankruptcy to which the title of the trustee can relate back (*Ex parte Attwater, In re Turner*, 5 Ch. D. 27). It was further decided by the Court of Appeal in this case, that the title of the holder of an unregistered bill of sale, who had no notice of the act of bankruptcy, is not protected by the 95th sec. of the Bankruptcy Act, that being a general enactment which cannot override the special provisions of the Bills of Sale Act.

"Time of bankruptcy" to which apparent possession relates.

It has been held that an agreement, in consideration of an immediate advance, to execute "on request" a bill of sale of personal chattels, is not a bill of sale requiring registration under the Act; and, further, that a bill of sale given upon demand, and in accordance with such a previous agreement, is not, although given on the eve of bankruptcy, an act of bankruptcy or a fraudulent preference (*Ex parte Homan, In re Broadbent*, L. R. 12 Eq. 598; *Ex parte Izard, In re Cook*, L. R. 9 Ch. 275).

Agreement to execute "on request," a bill of sale.

An agreement of this kind is practically an evasion of the Act, but it has been decided that unless it can be inferred from the circumstances that the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering the bill of sale, the transaction is good (*Ex parte King, In re King*, 3 Ch. D. 256).

On the other hand, it was decided, in *Ex parte Fisher, Re Ash* (L. R. 7 Ch. 636, 645), that such a postponement purposely made would be "evidence of an intention to commit an actual fraud against the general creditors." And this principle was given effect to in *Re Gibson, Ex parte Bolland* (8 Ch. D. 230), by the Chief Judge (Bacon); and by the Court of Appeal in *Ex parte Kilner, In re Barber* (13 Ch. D. 245), where it was held that the giving of the bill of sale having been postponed, the *onus* lay upon the holder to show the *bona fides* of the transaction, as well as the fact of a prior agreement. It should

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also be borne in mind that if at the commencement of the bankruptcy no demand has been made by the mortgagee for possession of the goods, the transaction would be defeasible by the trustee in bankruptcy under the reputed ownership clause (*Ex parte Harding, In re Farebrother*, L. R. 15 Eq. 223).

Possibly the extension of the definition of "bill of sale" under the new Act, to "any agreements, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security therein shall be conferred," was meant to strike at agreements to execute a bill of sale on request: but, if so, the words are not very happily chosen to make the meaning clear.

Successive bills  
of sale.

The giving and taking of a fresh bill of sale is evidence of an intention to cancel the former bill, so that the property becomes revested in the assignor immediately before the new sale; and the transaction, though really an evasion of the Act, has been held not to be conclusive evidence of a scheme to defraud the creditors (*Hollingsworth v. White*, 10 W. R. 619; *Ex parte Harris, In re Pulling*, L. R. 8 Ch. 48; *Smale v. Burr*, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17).

An evasion  
partially  
successful under  
the old Act.

The decision in the last cited case appears to run counter to the opinion of the Lords Justices James and Mellish in the case of *Ex parte Cohen, In re Sparke* (L. R. 7 Ch. 20). But the transaction in question in this case was in effect an assignment of the whole of the debtor's property in security of a past debt, and therefore void as an act of bankruptcy. That there was also an evasion of the Bills of Sale Act was some evidence of an actual intent to defraud; but at all events it did not make the transaction any better. This is what the decision in the case last mentioned amounts to. It is followed by the decisions, to the same effect, in *Ex parte Stevens, In re Stevens* (L. R. 20 Eq. 786); *Ex parte Payne, In re Cross* (11 Ch. D. 539).

Prevented  
under Act of  
1878.

The device of giving successive bills of sale so as to preserve the security without registration is now effectually guarded against by sec. 9 of the Act of 1878.

Equitable assign-  
ment to be good

If an agreement to give a bill of sale *upon request*, or upon



any other condition subsequent, is relied on as an *equitable assignment* of the goods, the non-registration of the agreement on a bill of sale has been held an insuperable objection to the title of the person relying on the agreement, as against the execution creditor or trustee in bankruptcy (*Ex parte Mackay, In re Jeavons*, L. R. 8 Ch. 643; *Ex parte Conning, In re Steele*, L. R. 16 Eq. 414). I must observe, in passing, that there would be great difficulty in supporting the proposition that an agreement to assign upon request can be a good equitable assignment so as to confer any immediate *right in security*. Upon this point I refer to the judgments of the Lords, and particularly that of Lord Cairns, pronounced in the case of *Shaw v. Foster*, L. R. 5 H. L. 321. As soon as the *request* is made, however, there is authority for saying that an equitable assignment is effected (*Ex parte Izard, In re Cook*, L. R. 9 Ch. 271, 275). That a transaction which is relied on as an equitable assignment must, in order to be valid against the execution creditor, be registered as a bill of sale, was again laid down in the case of *Edwards v. Edwards* (L. R. 2 Ch. D. 291). The effect of the Act of 1878, in regard to equitable assignments, is to affirm by statutory authority the principle established by the above cases. This is done by the 4th section, which extends the definition of a bill of sale to an agreement conferring a *right in equity* to any personal chattels.

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against creditors  
must be  
registered.

In *Ex parte Leman, In re Barraud* (L. R. 4 Ch. D. 23), a bill of sale of chattels was executed but not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition. It was held, affirming the decision of the Chief Judge in Bankruptcy, that the second mortgagee was entitled to such of the chattels as had not been seized by the first mortgagee before the liquidation. This decision was followed in *Ex parte Payne, In re Cross* (11 Ch. D. 539); and both decisions are in accordance with the decision of the Queen's Bench in *Richards v. James* (L. R. 2 Q. B. 285). In the last-mentioned case (by the judgment of the Court consisting of Cockburn, C.J., Blackburn, and Lush, JJ.) it is laid down (p. 291) that *the consequence of avoiding a bill of sale*

The effect of avoidance by an execution creditor is to avoid the bill of sale altogether.

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*by an execution is to avoid it altogether, and that in no other way can due effect be given to the statute. The principle applies equally to avoidance by bankruptcy. The principle is illustrated and applied in Chapman v. Knight, 5 C. P. D. 308. Goods belonging to K. and in the house occupied by him, were sold by the sheriff, who was formerly in possession under a fi. fa., and who gave the purchaser an inventory and receipt. The purchaser assigned the goods to a trustee for K.'s wife. She, with the authority of the trustee, sold them to W.; and W. let them, on hire, to K. The goods all along remained in the house, and, therefore, in the apparent possession of K. Of the above-mentioned instruments of sale the last only (namely, the sale to W.) was registered as a bill of sale, and this was done in the name of Mrs. K. A judgment creditor of K. seized the goods in execution, and he was held entitled to them. The County Court judge, who had tried the case, so decided on this ground that the inventory and receipt given by the sheriff was a bill of sale within the Bills of Sale Act, 1871, and ought to have been registered, and not having been registered was void, and that W. could stand in no better position than the first purchaser. Mr. Justice Grove, on the authority of the judgment in Richards v. James, above quoted, thought this decision right. In this Lopes, J., however, did not concur, and both judges affirmed the decision of the County Court judge, on a ground which seems to me more questionable; namely, that the bill of sale, which was registered, was not executed by (W.) the legal owner. But if W. were once assumed to be the owner, I do not see how the Bills of Sale Act applies at all, there being no question of an execution against W.*

In the above-mentioned judgment of *Richards v. James* (L. R. 2 Q. B. p. 291) it is justly observed that there is nothing in the Act (17 & 18 Vict. c. 36) which makes it necessary to register a bill of sale as against the holder of a subsequent bill of sale, whether the latter be registered or not. The case of *Meux v. Jacobs*, in the House of Lords (L. R. 7 H. L. 495) illustrates this. Under the Act of 1878 this observation will be subject to the effect of the clause in section 10 as to priority of registration.

It has been decided that sections 94 and 95 of the Bankruptcy Act (which protect *bond fide* business transactions) have no operation so as to set up a transaction which is void by the Bills of Sale Act (*Ex parte Attwater, In re Turner*, 5 Ch. D. 27 ; *Ex parte Payne, In re Cross*, 11 Ch. D. 533).

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Various decisions  
under Bills of  
Sale Act.

It has been decided that the doctrine of consolidation of mortgages in equity does not apply so as to give the holder of a bill of sale a right, as against a creditor who has seized the goods under a writ of execution, to any more of the proceeds than is expressed to be secured to him under the bill of sale (*Chesworth v. Hunt*, 5 C. P. D. 266).

It has been decided that, if a person on the eve of bankruptcy informs the holder of a bill of sale of the circumstance, and the latter accordingly takes his property out of the possession of the debtor, the transaction does not come within the 92nd section of the Bankruptcy Act, 1869, for avoiding fraudulent preferences (*Ex parte Symmons, In re Jordan*, 14 Ch. D. 693).

*Questions between Execution Creditor and Trustee in  
Bankruptcy.*

Referring to the division which I made, on p. 79, *supra*, of the questions there mentioned into two classes, I now consider, secondly, the questions which arise between the execution creditor and the trustee in bankruptcy claiming adversely to each other.

Trustee in  
bankruptcy in  
competition  
with execution  
creditor.

It has long been established as a clear principle of bankrupt law, that the title of the assignee (now called the trustee) relates back to the time of the act of bankruptcy on which the adjudication is founded, or to some prior act of bankruptcy. The effect of this doctrine, when carried to its logical consequence, was, that if the sheriff, after the act of bankruptcy, levied under an execution against the bankrupt, he levied not upon the goods of the bankrupt, but upon the goods of the assignee, and was liable to the latter as a wrong-doer. This was a great hardship on the sheriff, who, under the existing circumstances, was bound to levy upon the goods, but in consequence of a supervening adjudication of bankruptcy which he could not possibly foresee, might find his lawful and obligatory act made

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wrongful. Against this hardship the various bankruptcy statute since 1825 have provided remedies.

The sections of the statute now in force, the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), applicable to this subject, are the following :—

Section 11 of  
Bankruptcy  
Act, 1869.

By section 11, the above mentioned principle of bankruptcy law is recognised and adopted in these terms :—

“The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors, in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication.”

Section 95 of  
Bankruptcy  
Act, 1869.

By section 95 it is enacted that, subject to the provisions of the Act relating to the proceeds of the sale and seizure of goods of a trader, and certain other provisions, the following transactions (amongst others) by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy :—

“(3.) Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, the person on whose account such execution or attachment was issued had not at the time of the

same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

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In construing and applying these sections of the Act the following principles have been settled.

Principles on which these sections have been construed.

The filing of a petition of liquidation under the Bankruptcy Act, 1869, is an act of bankruptcy available for adjudication, and the title of the trustee relates back, whether to the filing of the petition or to any prior act of bankruptcy, in the same manner as the title of a trustee under a bankruptcy (*Ex parte Duignan, In re Bissell*, L. R. 11 Eq. 604; *Ex parte Todhunter, In re Norton*, L. R. 10 Eq. 425; *Ex parte Roche, In re Hall*, L. R. 6 Ch. 795, 799; *Ex parte Eyles, In re Edwards*, L. R. 16 Eq. 99).

It is implied or assumed in the sub-section of sec. 95 above quoted, that the act of bankruptcy there referred to is *prior* to the seizure by the sheriff (*Ex parte Todhunter, In re Norton*, L. R. 10 Eq. 425; *Slater v. Pinder*, L. R. 6 Ex. 228, 234; *Ex parte Roche, In re Hall*, L. R. 6 Ch. 795, 799; *Ex parte Schultze, In re Matanlè*, L. R. 9 Ch. 409).

According to the express words of this sub-section the transaction is valid unless at the time of the execution by *seizure and sale* the execution creditor has notice of the act of bankruptcy. And this implies that the transaction would be invalidated if the execution creditor receives notice of the act of bankruptcy at any time before his execution is perfected by sale (*Ex parte Veness, In re Gwynn*, L. R. 10 Eq. 419; *Ex parte Duignan, In re Bissell*, L. R. 11 Eq. 604).

Where a notice of certain *facts* is relied on as an express notice of an act of bankruptcy under this section, the facts stated must be such as *necessarily* to constitute an act of bankruptcy (*Evans v. Hallam*, L. R. 6 Q. B. 713). But it has been held under Section 31 of the Act, which also relates to notice of an act of bankruptcy, that notice to be effectual need not state the nature or particulars of any act of bankruptcy (Yate Lee on Bankruptcy, Notes to Section 31 of the Statute, note (b), and cases there referred to). And although in the case of *Evans v. Hallam*, above referred to, the judgment is

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based on the consideration that the notice was not such as to make it reasonable for the execution creditor to hesitate in enforcing his judgment, it does not appear that the essential character of a notice for this purpose differs from the notice required under Section 31 or Section 94 of the Act.

Notice to the sheriff's officer in possession is not notice to the creditor (*Ex parte Schultze, In re Matanlè*, L. R. 9 Ch. 409).

The *onus* is on the execution creditor, who relies on this section to prove that he was without notice. (*Ex parte Schultze, In re Matanlè*, L. R. 9 Ch. 409).

It seems clear that the purchaser who has notice of an act of bankruptcy before the sale has no title to the goods sold against the trustee in bankruptcy (*Ex parte Duignan, Bissell*, L. R. 11 Eq. 604). The section does not, however, provide for the case of a purchaser not having notice; and the title of such a purchaser in a case where the execution creditor has notice, will depend on considerations apart from this section. He may probably, if the sale is before adjudication in bankruptcy or the appointment of a trustee in liquidation, be able to rely upon the 94th section of the Act, which enacts that nothing in the Act contained shall invalidate (by subsection 3) "any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him at the date of adjudication." In former statutes the word "transaction" has been coupled with "contract" and "dealing," and this word has received a liberal construction by decisions; and it is now clear that it is not intended by the variance of language of this section from the former Acts, to narrow the protection afforded to strangers in regard to the property of the bankrupt (*Ex parte Arnold, In re Wright*, 24 W. R. 977). I am not aware, however, of any decided case in which a purchase of goods from a sheriff has been held to be a transaction or dealing with a bankrupt within the meaning of this section, and the point is not often of practical importance. In many cases the execution creditor is himself the purchaser, and if he were not, it would be seldom for the interest of the creditor to call in question

title of a purchaser at a *bond fide* sale, so long as the purchase money is available for their satisfaction.

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By section 87 of the Bankruptcy Act, 1869, provision is made in case of the goods of a trader being taken in execution in respect of a judgment for a sum exceeding £50 (a circumstance which is itself an act of bankruptcy under section 6, sub-section 5), and it is enacted to this effect :—that the sheriff shall retain the proceeds of the sale in his hands for fourteen days, and if within that time notice is served on him of a bankruptcy petition being presented against the trader (and adjudication of bankruptcy ensuing) he is to hold the proceeds, after deducting expenses, in trust for the trustee in bankruptcy ; otherwise “he may deal with the proceeds of such sale in the same manner as he would have done if no notice of the presentation of a bankruptcy petition had been served on him.” A mode of evading the effect of this section has recently been put in practice, by taking the debtor's goods under an *elegit* instead of seizing them to be sold under a *fieri facias*, and it was held by the Chief Judge Bacon and by the Court of Appeal that the evasion was successful (*Ex parte Abbot, In re Gourlay*, 15 Ch. D. 447).

Section 87 of  
the Bankruptcy  
Act, 1869.

The effect of section 87 on the validity of a sale was much canvassed in the case of *Ex parte Villars, In re Rogers*, L. R. 9 Ch. 432. Goods of a trader were taken in execution for a debt exceeding £50 and sold by the sheriff by private contract, with consent of the execution debtor to the execution creditor (Villars), who gave the sheriff a cheque for the amount. The sheriff kept the cheque for the fourteen days required by the statute and then handed it back to Villars in satisfaction of his debt and costs. Subsequently a petition was presented for adjudication in bankruptcy against the debtor, alleging as the act of bankruptcy on which the petition was founded, the seizure and sale of the goods above mentioned. The debtor was accordingly adjudicated bankrupt. The registrar, on the application of the trader, made an order declaring the sale void as against the trustee, and ordering Villars to deliver up the goods purchased by him from the sheriff.

Seizure and sale  
by sheriff,  
though an act of  
bankruptcy in  
the debtor may  
give a good title  
to a *bond fide*  
purchaser.

This order was appealed from, and it was argued that the seizure and sale being an act of bankruptcy, no title could be

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made through it as against the trustee in a bankruptcy within twelve months; and that the 95th section had no application to executions which are themselves acts of bankruptcy. No attempt, however, was made to impeach the validity of the transaction.

It was, however, decided by the Court that the sale was a sale though an act of bankruptcy was not necessarily a sale; that the sale by the sheriff by private sale (being in good faith) was valid; that Villars by the sale acquired a good title to the goods; and that no objection to the sale on the ground of the petition for adjudication having been given to the sheriff within the fourteen days under the 87th section, Villars, as a creditor, became entitled to the proceeds of the sale notwithstanding the supervening bankruptcy.

**Seizure before  
act of  
bankruptcy.**

I now come to consider the case where the *seizure* takes place *before* any act of bankruptcy is committed.

It may be observed that under the Bankruptcy Act of 1847 it was (by sec. 184) provided, in effect, that where a seizure of goods occurred before an execution had been obtained, and before the *seizure and sale*, the title of the trustee should prevail. This section was not re-enacted in the Bankruptcy Act of 1861. By the 12th section of this last Act it is enacted as follows:

“12. When a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted shall have any remedy against the property or person of the bankrupt in respect of such debt except in so far as is directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to sell or otherwise deal with such security in the same manner as he would have been entitled to do had he or deal with the same if this section had not passed.”

**Slater v.  
Pinder.**

The questions arising where an act of bankruptcy is committed subsequently to seizure of the goods under an execution



notice of the act of bankruptcy was given before completion of the execution by sale, were elaborately considered in the case of *Slater v. Pinder*, L. R. 6 Ex. 228, and 7 Ex. 95, the facts of which were as follows:—On the 19th of August, 1870, the sheriff seized goods under a writ of execution. On the 20th of August, 1870, a petition for adjudication in bankruptcy was duly presented against the debtor, founded on an act of bankruptcy committed that day. On the 22nd of August, 1870, at 11:45 A.M., the debtor was adjudicated bankrupt, and the plaintiff was afterwards duly appointed trustee. At 12 o'clock on the 22nd the sale commenced under the execution and proceeded until 2 o'clock, when notice of the adjudication was given to the sheriff and to the execution creditor, and the sale was stopped.

Two questions arose: 1st, Between the trustee in bankruptcy and the execution creditor as to the right to the proceeds of goods already sold; 2ndly, Whether, in case those proceeds were not sufficient to satisfy the execution, the execution creditor was entitled to have the residue levied out of the goods which at the time of the notice being given, remained unsold: in other words, whether or not the power of sale in the sheriff was determined by the notice of the intervening act of bankruptcy and adjudication.

By the unanimous judgment of the Court of Exchequer (L. R. 6 Ex. 228), both points were decided in favour of the execution creditor, on the ground that he is a creditor holding security within the meaning of the 12th section of the Bankruptcy Act, 1869; and the effect of this judgment is, that where, under an execution, goods are seized by the sheriff before any act of bankruptcy is committed, the execution creditor acquires an indefeasible right to have his execution levied upon the goods; and although there is a subsequent act of bankruptcy, and the debtor is adjudicated a bankrupt and all parties have notice of the adjudication before the sale takes place, the power of the sheriff to sell under the execution subsists in full force until the amount levied under the execution is satisfied.

This decision was followed by the Court of Chancery in the case of a liquidation under the Bankruptcy Act, 1869, *Ex parte Roche, In re Hall* (L. R. 6 Ch. 795), and was subsequently affirmed by the unanimous judgment of the Exchequer Chamber

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made through it as against the trustee in a bankruptcy ensuing within twelve months; and that the 95th section had no application to executions which are themselves acts of bankruptcy. No attempt, however, was made to impeach the good faith of the transaction.

It was, however, decided by the Court that the seizure and sale though an act of bankruptcy was not necessarily a void transaction; that the sale by the sheriff by private contract (being in good faith) was valid; that Villars by the purchase acquired a good title to the goods; and that no notice of a petition for adjudication having been given to the sheriff within the fourteen days under the 87th section, Villars, as execution creditor, became entitled to the proceeds of the sale notwithstanding the supervening bankruptcy.

Seizure before  
act of  
bankruptcy.

I now come to consider the case where the *seizure* takes place *before* any act of bankruptcy is committed.

It may be observed that under the Bankruptcy Act of 1849 it was (by sec. 184) provided, in effect, that where an act of bankruptcy occurred before an execution had been perfected by *seizure and sale*, the title of the trustee should prevail; but this section was not re-enacted in the Bankruptcy Act, 1869. By the 12th section of this last Act it is enacted as follows:—

“12. When a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. But this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed.”

*Slater v.  
Pinder.*

The questions arising where an act of bankruptcy occurred subsequently to seizure of the goods under an execution, and

notice of the act of bankruptcy was given before completion of the execution by sale, were elaborately considered in the case of *Slater v. Pinder*, L. R. 6 Ex. 228, and 7 Ex. 95, the facts of which were as follows:—On the 19th of August, 1870, the sheriff seized goods under a writ of execution. On the 20th of August, 1870, a petition for adjudication in bankruptcy was duly presented against the debtor, founded on an act of bankruptcy committed that day. On the 22nd of August, 1870, at 11:45 A.M., the debtor was adjudicated bankrupt, and the plaintiff was afterwards duly appointed trustee. At 12 o'clock on the 22nd the sale commenced under the execution and proceeded until 2 o'clock, when notice of the adjudication was given to the sheriff and to the execution creditor, and the sale was stopped.

Two questions arose: 1st, Between the trustee in bankruptcy and the execution creditor as to the right to the proceeds of goods already sold; 2ndly, Whether, in case those proceeds were not sufficient to satisfy the execution, the execution creditor was entitled to have the residue levied out of the goods which at the time of the notice being given, remained unsold: in other words, whether or not the power of sale in the sheriff was determined by the notice of the intervening act of bankruptcy and adjudication.

By the unanimous judgment of the Court of Exchequer (L. R. 6 Ex. 228), both points were decided in favour of the execution creditor, on the ground that he is a creditor holding security within the meaning of the 12th section of the Bankruptcy Act, 1869; and the effect of this judgment is, that where, under an execution, goods are seized by the sheriff before any act of bankruptcy is committed, the execution creditor acquires an indefeasible right to have his execution levied upon the goods; and although there is a subsequent act of bankruptcy, and the debtor is adjudicated a bankrupt and all parties have notice of the adjudication before the sale takes place, the power of the sheriff to sell under the execution subsists in full force until the amount levied under the execution is satisfied.

This decision was followed by the Court of Chancery in the case of a liquidation under the Bankruptcy Act, 1869, *Ex parte Roche, In re Hall* (L. R. 6 Ch. 795), and was subsequently affirmed by the unanimous judgment of the Exchequer Chamber

PART II.  
§ 3.

(L. R. 7 Ex. 95). It has also been followed in *Ex parte Bailey*, *In re Jecks* (L. R. 13 Eq. 314), and *Ex parte Lovering*, *In re Peacock* (L. R. 17 Eq. 452).

No right in  
security acquired  
by creditor until  
seizure.

There must be *actual seizure* in order that the creditor may acquire a preferential security; and the mere *delivery of the writ* into the hands of the sheriff before an act of bankruptcy is committed will not do (*Ex parte Williams*, *In re Davies*, L. R. 7 Ch. 314; *In re Balbirnie*, *Ex parte Jameson*, 3 Ch. D. 488).

Effect of section  
10 of Judicature  
Act, 1875.

I must here advert to the 10th section of the Judicature Act, 1875, which, to an extent not clearly defined, applies the rules of bankruptcy to the liquidation of insolvent companies. The decisions of the judges as to the extent to which the rules are to be so applied are conflicting (*Coal Consumers' Company*, 25 W. R. 300; *Re Albion Steel and Wire Co.*, L. R. 7 Ch. D. 547; *Printing and Numerical Registering Co.*, 8 Ch. D. 535; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335; *In re Richards & Co.*, 11 Ch. D. 676; *Re West of England, &c., Bank*, *Ex parte Brown*, 27 W. R. 869). But by the decision of the Court of Appeal *In re Withernsea Brickworks Co.* (C. A. 16 Ch. D. 337), following the decision of Mr. Justice Fry in the case of *Richards & Co.*, and disapproving the decision of the Master of the Rolls in *Printing, &c., Co.*, the narrower view of the scope of the enactment has prevailed. According to this view the enactment merely imports into administration actions and windings up of companies by the Court the rule of bankruptcy that a secured creditor can only receive a dividend on the balance of his debt after realising or assessing and deducting the value of his security. In this view the enactment has no significance which comes within the scope of the present work.

### PART III.

#### THE CONSENT.

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A CONTRACT of sale is binding from the moment of *consent* of PART III.  
the parties.

*Consent*, as here understood, is the concurrence of intention Consent, what.  
of both parties in the terms of the same proposition, that in-  
tention being expressed by some overt act on the part of each.

In order to give the intention any legal significance, some How expressed  
overt or outward act of expression is necessary, since otherwise  
the intention would be incapable of proof.

The outward act indicating the intention on the one side, Offer, what.  
and inviting the concurrence of the other, is called an *offer*.

If the concurrence takes place at a personal interview, Consent inter-  
changed at  
personal inter-  
view.  
whether in words on both sides, or by words on the one side  
and a gesture of assent on the other, or by mutual assent given  
in either way to the terms of a written document, there can be  
no difficulty (apart from any conflict of testimony) in proving  
the concurrence as an actual fact.

But where the parties are at a distance from each other, and  
correspond by letter or telegram, certain presumptions are by  
the exigencies of mercantile business imported into the trans-  
action.

When an offer is sent by letter, the person making the offer Offer by letter,  
presumed in-  
tention.  
is conclusively presumed to make during each instant of time  
his letter is travelling the same identical offer (*Adams v. Lind-  
sell*, 1 B. & Ald. 681), and that presumption continues until  
either a communication recalling the offer has *reached* the  
person to whom the offer is made, or until a period of time  
has elapsed, the length of which is determined either by the

## SALE OF GOODS.

ART III.

terms of the offer, or by what is a reasonable time for consideration, having regard to the circumstances and to the usual course of business, and no longer (*Ramsgate, &c., Co. v. Goldsmid*, L. R. 1 Eq. 109; *Baily's case*, L. R. 5 Eq. 428, 3 Ch. Ap. 592; *Stevenson v. M'Lean*, 5 Q. B. D. 346; *Byrne v. Van Tienhoven*, 5 C. P. D. 344). It need hardly be said that a definite refusal of an offer by the party to whom it is made or his authorised agent, puts an end to the offer; and this is equally the case although the party making the offer has named a period for acceptance which is not expired.

*son v.*  
17.

In the case of *Stevenson v. M'Lean* the plaintiff sued the defendant for non-delivery of iron under these circumstances:—The defendant by letter to the plaintiff had made an offer of iron warrants at a certain price “open till Monday.” On the Monday the plaintiffs had sent a telegram, “Please wire whether you would accept” some slightly different terms. The defendant did not reply to this but sold the iron to a third party. Subsequently, but before notice of this sale reached the plaintiff, he telegraphed (at 1.34 on the same Monday) accepting the defendant's offer. The case coming on further consideration before Mr. Justice Lush, he construed the communication sent by the plaintiffs not as a counter offer implying a refusal of the defendant's offer, in which case there would have been an end of the matter (*Hyde v. Wrench*, 3 Beav. 334), but as an inquiry whether the defendants would modify their offer. Consequently, no notice of recall of the offer having reached the plaintiff when he accepted the offer, the offer and acceptance constituted a binding contract; and the defendant was liable for the non-delivery.

I apprehend that, assuming the warrants in question to have represented certain specific iron, there is nothing in this decision to throw doubt upon the property in the iron having passed to the third party under the bargain and sale to him made before the acceptance of the pending offer. This would be in accordance with the cases relating to sale of land where it is held that the first completed contract passes the property in equity (*Potter v. Sanders*, 6 Ha. 1; *Dickinson v. Dodds*, 2 Ch. D. 463).

## PART III.

The communication recalling an offer need not be in any way formal. It is enough for this purpose, if the fact that the offer is at an end has in any way come to the knowledge of the other, as for instance, by his being informed that the offerer has sold the property to some one else (*Dickinson v. Dodds*, 2 Ch. D. 463).

The acceptance of the offer during the period when it is expressed or presumed to continue as above mentioned, and no notice of withdrawal having arrived, concludes the contract, and the appropriate overt act is, generally speaking, the irrevocable dispatch of a communication to the party making the offer of the acceptance. This may be done either by adopting a channel specially pointed out by the party making the offer; or, if no such channel is expressly indicated, by the post. If merely sent by the person accepting through or to his own agent, the communication is not deemed irrevocable until delivered, and in the meanwhile the acceptance is presumed to be still *in fieri*, and there remains to each party *locus penitentiae* (*Hebbs' case*, L. R. 4 Eq. 9). Still less will a merely private act of the person to whom the offer is made constitute acceptance, such as putting a letter into a drawer (*per Blackburn, J.*, in *Brogden v. Metr. Ry. Co.*, 2 App. Ca. 692), or a company entering an allotment of shares on their own books without sending a letter giving notice of it (*Ward's case*, L. R. 10 Eq. 659; *Gunn's case*, L. R. 3 Ch. 40), or sending a notice to a wrong and unauthorised address (*Robinson's case*, L. R. 4 Ch. 330).

Where there is an acceptance by post, it is conclusively settled by authority that the acceptance is complete, and the bargain struck, at the moment of posting the letter (*Dunlop v. Higgins*, 1 H. L. C. 381; *Harris's case*, L. R. 7 Ch. 587), and this is not affected by an accidental delay in delivery.

But what if the letter of acceptance, through no fault of either party, entirely miscarries? There were two decisions, one by Lord Romilly (*Reidpath's case*, L. R. 11 Eq. 86), and one by the Court of Exchequer (*British American Telegraph Co. v. Coulson*, L. R. 6 Ex. 108), which decided that the contract

Acceptance of offer.

By post.

What if letter miscarries.

## PART III.

did not in such a case become binding on the offerer. The cases here cited arose out of the contract to take shares in a company; in regard to which it has been held that, in the ordinary course of business, the application for shares is an offer which is accepted by a letter of allotment sent by the company (*Pellat's case*, L. R. 2 Ch. 527; *Gunn's case*, L. R. 3 Ch. 323; *Sahlgreen and Carral's case*, L. R. 3 Ch. 323).<sup>1</sup> Now, by the decisions of Lord Romilly and of the Court of Exchequer above referred to, it was held that if the letter of allotment, without fault of either party, miscarried in the post, the allotment was not binding on the applicant. This doctrine was questioned by Sir G. Mellish in *Harris's case* (L. R. 7 Ch. 587, 595), and also by V.-C. Malins in a well-considered judgment of his in *Wall's case* (L. R. 15 Eq. 18, 25); and was ultimately expressly overruled by the decision of the Court of Appeal in *Household Fire Insurance Co. v. Grant* (4 Ex. D. 216); in accordance with what no doubt was the *ratio decidendi* of *Dunlop v. Higgins* (1 H. L. C. 381). So that it is now unquestionable that the posting of a letter in the ordinary course of business, accepting an offer contained in a letter, is an act conclusively effecting a binding contract.

an an accept-  
ace when  
asted be re-  
lled by an  
tress!

Another question which may afford matter for speculation is this. When a letter of acceptance is put in the post, is it absolutely irrevocable, in this sense, that a letter or telegram sent afterwards, and arriving at the same time or sooner, cannot recall it? On principle, I should say that the acceptance cannot be so recalled. The letter of acceptance, as soon as posted, becomes the property of the addressee. The subsequent letter or telegram can only say that the sender has changed his mind. It may amount to an offer to rescind the contract, but I see no reason or principle on which it can by its own force rescind the contract.

There is a Scotch case, *Countess of Dunn v. Alexander*, 9 S. & D. 190, which bears upon this last point. Lady D. writes to Lady A. about a servant, and receives in reply a letter from

<sup>1</sup> The subject of consent in regard to the contract to take shares in a company, is treated in detail in a subsequent part of this work (Part ix., *post*).



Lady A. conveying an offer from a servant (X.) to enter Lady D.'s service on certain terms. Lady D. writes back to Lady A. accepting the terms. Lady A. forwards this letter, with a communication of her own, to X., and immediately afterwards receives another letter from Lady D. recalling her acceptance. Lady A. sends an express to the post with this last letter, and both letters go by the same post and reach X. together. It seems, however, that the first letter had been actually posted first. The majority of judges in the Court of Session held that Lady D. was not bound. They treated Lady A. as Lady D.'s agent in the matter, and held (in effect) that X., having received notice of recall of the agent's authority at the same time as receiving from the agent notice of the acceptance of her offer, could not hold Lady D. bound. This decision was long before the decision of *Dunlop v. Higgins*, and the judges hardly seem to have considered the importance (on their assumption of Lady A. having been Lady D.'s agent) of the *posting* of the first letter by Lady A. I am inclined to think that the logical consequence of holding Lady A. to be Lady D.'s agent, combined with the law as settled by *Dunlop v. Higgins*, would be that a bargain was struck when the acceptance was posted by Lady A. The note of the Sheriff-Substitute on the case, though taken little account of by the superior Court, seems to me very good reasoning. He decided, "That from the manner of acceptance as expressed by Mr. Bell, in treating of the contract of sale, there is between the parties, *in idem placitum concursus et conventio*, which constitutes the contract; that as, in the present instance, the contract was completed by the transmission (by Lady A.) of the first letter, the engagement between the parties was rendered indissoluble without the consent of both, and that it was consequently beyond the power of the noble defendant at any time, however short the interval, to retract the acceptance or renege from the engagement."<sup>1</sup>

<sup>1</sup> It seems that the French Court of Cassation have held that when the acceptance and the revocation of it arrive together, there is no contract. Pollock on Contracts, p. 14, and case cited in note there. The case is not very closely

reasoned, nor does the Court appear to have adverted to what we should consider the crucial point, namely, whose *agent* is the post? On this point, indeed, the rules of the French post-office afford room for a distinction, for a letter may,

## PART III.

Letter purport-  
ing to accept,  
but introducing  
new term.

It need hardly be said that if a letter purporting to accept an offer introduces a new term as part of the proposed contract, there is no completed contract, nor any acceptance, but merely a new offer on the other side (*Routledge v. Grant*, 1 Moo. & P. 717; *Cope v. Albinson*, 8 Exch. 155; *Jordan v. Norton*, 4 M. & W. 161; *Felthouse v. Bindley*, 11 C. B. N. S. 869; *Addinell's case*, L. R. 1 Eq. 225; *Jackson v. Turquand*, L. R. 4 H. L. 305; *Pentelow's case*, L. R. 4 Ch. 178). But the case is different if the person accepting merely accompanies his acceptance by a collateral requisition (*Peek's case*, L. R. 4 Ch. 532; *Harris's case*, L. R. 7 Ch. 587).

Where parties  
intend to execute  
a formal  
contract.

The distinction last mentioned is important in a class of cases where a correspondence relating to proposed terms of agreement contains a proposal for a formal contract to embody the terms. If two persons by correspondence agree upon terms for sale and purchase (or upon the terms of any other contract) the agreement is none the less binding if it appears from the correspondence that it was contemplated by the parties, as a matter collateral to their agreement, that a formal contract should be drawn up and signed embodying the terms. As where the plaintiff's agent accepted a tender by letter, adding, "the contract will be prepared by, &c." (*Lewis v. Brass*, 3 Q. B. D. 667); and where an agent wrote, "we are instructed to accept your offer of £800 for these premises, and have asked Mr. Jenkins' solicitor to prepare contract" (*Bonnevell v. Jenkins*, 8 Ch. D. 70); and where parties agreed by correspondence to terms embodied in printed conditions of sale including a condition that "each purchaser will be required to sign a contract embodying the foregoing conditions, &c." (*Rossiter v. Miller*, H. L. 3 App. Cas. 1124). Still less is the contract incomplete, merely because, after coming to terms, an abortive attempt is made to embody the terms in a formal instrument (*Heyworth v. Knight*, 17 C. B. N. S. 298).

until dispatched from the office, be recalled by the sender on complying with certain regulations, and this distinction has been given effect to by the Lords Justices in the case of *Ex parte Cude, in re*

*Devize*, L. R. 9 Ch. 27, where Lord Justice Mellish threw out the view that this rule made the post-office the agent of the sender until the letter left the town.

But if it appears that the drawing up and signing a formal contract was contemplated as a condition precedent of the final arrangement which was to bind the parties, the case is different. An advertisement for tenders concluded as follows :—" P.S. All contractors will have to sign a written contract after acceptance of tender." A tender was made and accepted, and subsequently withdrawn. It was held that the person tendering, not having signed a contract after acceptance, was not bound (*Kingston-on-Hull v. Petch*, 10 Ex. 610). The Court drew the inference that the "contract" was intended to settle important details which were not contained in the advertisement. And where an offer to take a lease was accepted "*subject to the preparation and approval of a formal contract*," it was held that no contract had been made (*Winn v. Bull*, L. R. 7 Ch. D. 29; *Honeyman v. Marryat*, 26 L. J. Ch. 619).

An offer purporting to bind the offerer to keep the offer open, or to give the option of acceptance, for a certain period, does not in any way prevent the offerer from recalling the offer sooner if so minded. The promise not to recall the offer, being without consideration, is not binding either in law or equity upon the person making such promise (*Cooke v. Oxley*, 3 T. R. 653; *Routledge v. Grant*, 4 Bing. 653; *Dickinson v. Dodds*, Court of Appeal, 2 Ch. D. 463). In deciding the case of *Stevenson v. M'Lean* (5 Q. B. D. 346) above mentioned, the judges were careful to show that they in no way intended to infringe upon this rule. The only possible effect, therefore, of a statement that the offer is open until a particular date, is that if not accepted on that date it will be at an end without further notice of withdrawal.

Engagement to keep offer open is not binding.

A bid at an auction is a mere offer; the auctioneer is, until a bargain is struck, the agent of the vendor alone; and the vendor's acceptance of the offer is signified by knocking down the hammer. Until then either party may retract (*Payne v. Cave*, 3 T. R. 148; *Warlow v. Harrison*, 28 L. J. Q. B. 18). It follows from the preceding paragraph that a statement in the conditions of sale by auction, that no bidding is to be retracted, is utterly nugatory in regard to a stranger bidding at

Bid at an auction.

## PART III.

the auction. This is admitted by Lord St. Leonards (Vendors and Purchasers, Ch. 1, s. 2, par. 2), who appears to have invented the condition. It is at most a stipulation to which the bidder by his bid assents, and thereby in effect promises not to retract his bidding. But there is clearly no consideration for this promise. The case is different if the person bidding has been party to an antecedent contract embodying the conditions of sale; as would be the case where he is a consenting party to a family arrangement whereby (under the order of the Court or otherwise) the sale takes place (*Freer v. Rimner*, 14 Sim. 391).

Identity of meaning a necessary element. Mere variance of language immaterial if same terms are meant.

The identity of the proposition intended by both parties is necessarily an element in the consent. Where there is a variance of language in the expressions used on either side, the question is whether the variance is material; or in other words whether, notwithstanding the variance of language, the terms intended are identical. Thus where bought and sold notes were the only evidence of intention on either side, and the subject was, by a mistake of the broker who delivered bought and sold notes of the goods, described on the one side as "Petersburgh" hemp, and on the other as "Riga" hemp, a superior article; there was no contract (*Thornton v. Kempster*, 5 Taunt. 786). So where a letter offering "good barley" on certain terms was answered by a letter saying,—"We accept, expecting you will give us *fine* barley," and a letter in reply pointed out that the first letter contained no such expression as "fine" barley, and declined to ship any:—evidence being given that "good" and "fine" barley were terms well known in the trade as distinct, it was held that there was no contract (*Hutchison v. Bowker*, 5 M. & W. 535). But where the documents differ in language, but are not plainly contradictory, evidence of mercantile usage is admissible to show that the variance is immaterial (*Bold v. Rayner*, 1 M. & W. 342). The authorities relating more particularly to variance in bought and sold notes, will be further considered in Part VIII., *post*.

## Mistake.

Where, through a *bond fide* mistake of fact, one party is assenting to a totally different proposition from the other (pro-

vided he has not done so in such terms or under such circumstances as to warrant the other in relying upon his having meant the same thing), there is no contract (*Lindsay v. Cundy*,<sup>1</sup> 2 Q. B. D. 96; *Cundy v. Lindsay*, 3 App. Ca. 459; see also *Raffles v. Wickelhaus*, 2 H. & C. 906; *Phillips v. Bistolli*, 2 B. & C. 511; *Boulton v. Jones*, 2 H. & N. 564). And even where there is literally a concurrence in an identical proposition, there may be a failure of true consent, if, through mutual mistake, there is an essential misapprehension of the situation. As, for instance, if a supposed reversioner were to agree with the assignee in bankruptcy of a supposed tenant for life for the sale of the timber on the estate, and it turns out that at the date of the agreement the supposed tenant for life is dead (*Cochrane v. Willis*, L. R. 1 Ch. 58; see also cases of *Gompertz v. Bartlett*, 2 E. & B. 849; *Young v. Cole*, 3 Bing. N. C. 724, Part V., section 3, *post*; *Emmerson's case*, L. R. 1 Ch. 433, Part VIII., *post*). And generally if A. contracts with B. for the purchase of property or an interest in property supposed to belong to B., but which really belongs to A.; the contract will not be enforced, and even after execution of such a contract the parties will, if possible, be restored to the original position (*Beauchamp v. Winn*, L. R. 6 H. L. Ap. 223; *Cooper v. Phibbs*, L. R. 2 H. L. Ap. 149; *Jones v. Clifford*, 24 W. R. 979).

Consent is essentially an act of the mind by a free agent. Force or fear. The seeming consent, which arises from overmastering force or fear, and the consequent acts purporting to express that consent, are by the legal or equitable rules of all civilised nations, utterly and *ab initio* void. In the Roman Law it was enacted by the edict of the Prætor, "*Quod metus causâ gestum erit, ratum non habeo*" (Dig. L. 1), and the same principle has always applied both at law and in equity in England. The only difference, in different systems of law, relates to the species of circumstances under which it is presumed that the motive of fear has been dominant in regard to the act in question. I shall content myself with quoting the case of *Bayley v. Williams*, 4 Giff. 638, showing the way in which this subject

<sup>1</sup> Commented on pp. 144-145, *infra*.

## PART III.

has been viewed in an English Court of Equity. The Vice-Chancellor there said, "If the fair result of the evidence shows that the agreements were executed under influence felt by the plaintiff, and exercised by the defendants; if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this Court a security obtained under such circumstances cannot stand.

"The inequality in the position of the parties, the one exacting a security which the other is desirous to give in order to save his son from exposure, disgrace, and ruin, taints the security obtained under the influence of such fear. If the main and influencing purpose was the relief of the son from the consequences of his crime, if this was the main consideration operating on the father's mind, and was the origin and real cause of the transaction, the intervention of other circumstances or other collateral advantages to the father, will not be enough to justify the Court in upholding such a security."

## Fraud.

In the above remarks it will be seen that the *ratio decidendi* is that there was no real consent of a free agent, but only that seeming consent of a mind overmastered by fear. This is quite different from the *ratio decidendi* in cases of fraud, where there is true consent obtained by means of a deception. The questions which arise out of fraud will be considered at length in a later part of this work.

Where the effect of the fraud is that goods are obtained without consent.

I must, however, here advert to a class of cases arising out of fraud, and resulting in a seeming contract; but where the deception was such as to prevent any real concurrence of intention, and it has been accordingly held that there was no contract at all. Cases of this kind are *Hardman v. Booth*, 1 H. & C. 803, and *Lindsay v. Cundy*, 1 Q. B. D. 348; 2 Q. B. D. 96, reported *sub. nom. Cundy v. Lindsay*, 3 App. Ca. 459. In the latter case the question of intention was one of some nicety, and requires a full statement of the facts to be appreciated. The case was this :—

## PART III.

A certain person of the name of Blenkarn, dating from 37, Wood Street, Cheapside, wrote to L., a manufacturer in Ireland, proposing a purchase of goods, and fraudulently signing his letters with a signature having the appearance of "Blenkiron & Co." L., supposing, as Blenkarn intended he should, that the letters came from a highly respectable firm of the name of Blenkiron & Co., who carried on business at 123, Wood Street, supplied the goods, invoiced and directed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside," and the goods so supplied were fraudulently taken in by Blenkarn who occupied a room which he called a warehouse looking into Wood Street, but entered by a door round the corner in Little Love Lane. The fraud having been discovered, Blenkarn was criminally prosecuted and sentenced; and L. then brought his action to recover his goods in the hands of a person who had *bond fide* bought them from Blenkarn. The Court of Appeal reversing the judgment of the Queen's Bench Division decided in favour of the manufacturer; and this decision was affirmed by the House of Lords. It was held that there was nothing in the circumstances which would have divested L. of the property unless there was a contract of sale with Blenkarn; and that there was no contract because L. never intended to sell to Blenkarn, of whom he had no knowledge, nor to any person except the well-known firm of Blenkiron & Co. It was not therefore a case of consent induced by fraud, but a case where the *consensus* of mind which could lead to any agreement or any contract whatever was entirely absent.

This is a convenient place to note the principle, applying to Illegality. contracts generally, that consent cannot receive legal effect so as to confer an active title upon one of the persons concerned, if the proposition consented to by him is either directly prohibited by authority, or involves conduct subversive of good morals or public policy. The principle is *In pari delicto potior est conditio defendentis* (*In re Mapleback, Ex parte Caldecott*, 4 Ch. D. 150).

The contract is equally bad whether the illegality be in the promise or the consideration. And although one of several promises made upon the same consideration may be given

## PART III.

effect to although others are illegal (provided that the lawful promise is separable from and not dependent on the unlawful one, see *Bourke v. Blake*, 7 Ir. C. L. R. 348); yet if any part of the consideration for a promise is illegal, the promise is wholly void of legal effect (*Featherstone v. Hutchinson*, Cro. Eliz. 199; *Waite v. Jones*, 1 Bing. N. C. 662; *Shackell v. Rozier*, 2 Bing. N. C. 646; *Scott v. Gilmore*, 3 Taunt. 226; *Harrington v. Graving Dock Co.*, 3 Q. B. D. 549; *Howden v. Haigh*, 11 A. & E. 1033; *Hopkins v. Prescott*, 4 C. B. 578). In sales the contract is twofold, and that which is the consideration on one side is commonly the thing promised on the other. The only question is whether the illegal stipulation is of the essence of the contract (see *Bourke v. Blake*, *supra*).

Where subject  
matter of sale  
illegal.

In regard to sales, if the thing sold is in itself contrary to good morals, as an obscene book or print, the sale is clearly void (*Poplett v. Stockdale*, Ry. & Moo. 337; *Fores v. Johns*, 4 Esp. 97).

Sale for an  
illegal purpose.

A sale is also void if the goods are sold to be used for an illegal or immoral purpose of which the vendor has notice (*Langton v. Hughes*, 1 M. & S. 593; *Cannan v. Bryce*, 3 B. & Ald. 179; *Pearce v. Brooks*, L. R. 1 Ex. 212; *Taylor v. Chester*, L. R. 4 Q. B. 309). There is an exception to this in the case of a sale made and executed abroad of goods intended to be smuggled into this country, the reason being (apparently) that we could not afford reciprocity in the admission that such sales are illegal (*Holman v. Johnson*, 1 Cowp. 348). But if it is part of the bargain that the seller is to pack the goods in a manner convenient for smuggling, or there is otherwise any arrangement that he is to assist or participate in the profits of the smuggling venture, the whole transaction is deemed illegal (*Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Pentaluna*, 4 T. R. 466; *Waymall v. Reed*, 5 T. R. 599; *Pellecat v. Angell*, 2 C. M. & R. 311).

Smuggling  
contracts.

Sale of a public  
office or its  
emoluments.

The sale of a public office, where the nomination to, or influence in obtaining the office, is in private hands, has been held, by a long series of cases (both at common law and under the statutes 5 & 6 Ed. VI. c. 16, and 49 Geo. III. c. 126) to be illegal; and the same is the case with any agreement for



transfer or partition of the fees or emoluments of the office; *Garforth v. Fearon*, 1 H. Bl. 237 (Customs); *Parsons v. Thompson*, 1 H. Bl. 322 (Dockyards); *Hanington v. Du Chastel*, 1 Bro. C. C. 124 (King's Household); *Methold v. Welbank*, 2 Ves. Sen. 238 (Gaoler); *Law v. Law*, 3 P. Williams, 391 (Excise); *Hopkins v. Prescott*, 4 C. B. 578 (collector of taxes, &c.). These cases were decided on the ground of the public nature of the duties to be performed, and in some cases also on the ground of the secrecy of the agreement, and the deception towards the person who makes or sanctions the appointment on a recommendation which he assumes to be disinterested. In *Aston v. Gwinnell* (3 Y. & J. 136) an agreement for assignment of a salary by a person whom the Court considered a mere clerk holding office at the pleasure of his superior, and that superior sanctioning the agreement, was held good. The same was held as to a private secretary in the case of *Harrison v. Klopprogge*, 2 Bro. & B. 678.

In the days of the monopoly of the East India trade, the command of an East Indiaman was a lucrative and responsible post, obtained by the sanction of the East India Company to the recommendation of the private owners. In the cases of *Blachford v. Preston*, 8 T. R. 89, and *Card v. Hope*, 2 B. & C. 661, it was decided that such a recommendation could not be made the subject of traffic, and in the latter case there was a strong expression of an opinion that the same principle would apply to an appointment to the command of a ship by private owners, it being a matter of public policy that such appointments should be governed by the principle *detur digniori*.

Command of an East Indiaman.

In the following cases transactions have been held illegal under the statutes above referred to (5 & 6 Ed. VI. c. 16, and 49 Geo. III. c. 126)—*Sir A. Inglis' case* (coferer of King's house), Co. Litt. 234 A., where the appointment was held void, and the office vacant; *Dr. Trevor's case*, Cro. Jac. 269 (Chancellor and other officers of Ecclesiastical Courts, see also *Robotham v. Trevor*, 21 Brownl. 11); *Woodward v. Foxe* (registrar to archdeaconry), 3 Lev. 289; *Huggins v. Bainbridge* (warden of the Fleet), Willes, 241; *Browning v. Halford*

Cases under the statutes 5 & 6 Ed. VI. c. 16, 49 Geo. III. c. 126.

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(under sheriff), Free. 19; *Williamson v. Barnsley* (steward of Court Leet), 1 Brownl. 71; *Rex v. Charretier*, 13 Q. B. 447, where a person having the nomination to a cadetship in the Hon. East India Company's service, and receiving money for giving it, was held liable to an indictment; *Graeme v. Wroughton*, 11 Ex. 146, where the resignation of a majority in the H.E.I.C.S. for a pecuniary consideration was held illegal, and a security for payment of the money void.

On the other hand, certain offices of profit which were saleable by custom, and to which probably no responsible duties were attached, have been held not within the scope of the statutes, or of the principle of common law, *Godbold's case*, 4 Leon. 33; *Ex parte Butler*, 1 Atk. 210.

Under the statutes, the distinction has been made that the holder of an office may appoint a *deputy*, reserving to himself a certain sum out of the salary, or a certain proportion out of the fees; but may not reserve to himself the whole profits, nor stipulate for a certain sum where the profits are uncertain (*Godolphin v. Tudor*, 2 Salk. 467; 6 Mod. 234; Willes, 575 n. = affirmed in Parl., 1 Bro. P. C. 135; *Culliford v. De Cardonell*, 2 Salk. 466; *Greville v. Atkins*, 9 B. & C. 462; *Layng v. Paine*, Willes, 571).

Assignment of  
pay, half-pay, etc.

The following decisions show that any assignment of the emoluments or pay of an office in the public service (not being a pension for past services merely), is contrary to law:—*Palmer v. Bate*, 2 Br. & B. 673; *Wells v. Foster*, 8 M. & W. 149; *Flaherty v. Odlum*, 3 T. R. 681; *Lidderdale v. Montrose*, 4 T. R. 248; *Barwick v. Reade*, 1 H. Bl. 627.

Arrangement by  
a corporation for  
commuting  
statutory fees.

In *Corporation of Liverpool v. Wright*, 28 L. J. Ch. 868, an arrangement between the Corporation and the Clerk of the Peace (an officer appointed by the Corporation but holding office *during good behaviour* and paid by fees fixed by statute), with the object of commuting the fees for a fixed salary, the difference to be received or borne by the borough fund, was decided to be illegal and void, on the grounds:—1st. That no bargain could be made as to an office of trust of this description; 2ndly, That the law presumes, with reference to an office of trust, that

the holder requires the payment which the law has assigned to him, for the purpose of upholding the dignity and performing the duties of the office.

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A relaxation of the strict rules as to bargains relating to such offices has (apparently) been allowed in the case of a *bond fide* partnership between *solicitors* in regard to the public appointments held by one of them. In the case of *Sterry v. Clifton*, 9 C. B. 110, a solicitor (A.), who held several public appointments and other offices, entered into partnership with another solicitor (B.), by a deed which provided that the emoluments of the offices then held by A., or which during the subsistence of the partnership should be held either by A. or B., should be partnership property; and also in case of A.'s death before the time assigned for the duration of the partnership, and in certain events, the profits of the partnership should be divisible between B. and the executors of A. It was held, on a case stated by the Court of Chancery for the opinion of the Court of Common Law, that the partnership deed and the particular clause of it last mentioned were good. Owing to the form in which the case came before the Court, no reasons for the decision are given, and the decision *may* have been given on the ground that the deed of partnership must be construed as dealing only with those offices which could legally be dealt with. But more probably it was on the broader ground that the transaction was not within the mischief intended to be provided against by the rule as to traffic in public offices.

Partnership by solicitors in country appointments may be good.

The question raised by the last clause of the partnership was a different one, namely, whether the profits of a *solicitor's* business could be shared by unqualified persons notwithstanding the Act 22 Geo. II. c. 46, s. 11.<sup>1</sup> It was in effect decided that any *bond fide* arrangement by a solicitor or his representatives to realise the *goodwill* of his business is not within the mischief of the statute. See also *Candler v. Candler*, 6 Madd. 141; *Jacob*, 225; *Bunn v. Guy*, 4 East, 190.

The decision of Lord Eldon in *Candler v. Candler*, 1 Jac.

<sup>1</sup> This enactment is formally repealed, but substantially re-enacted by 6 & 7 Vict. c. 73, s. 32.

See, as to its application, the cases of *Tench v. Roberts*, 6 Madd. 145; *In re Jackson*, 1 B. & C. 270.

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229, 231, shows that this conclusion was not arrived at without consideration of possible mischief of another kind. "I should state," he says, "that this statute, if the construction be such as is contended for, has been violated over and over again, and by the best men in the profession. It has happened to me to know, that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that, consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I know that this would rip up many transactions, and I was happy that the Court of King's Bench (*Bunn v. Guy*, 4 East. 190) was of a different opinion, though I never could entirely reconcile myself to their doctrine." These *dicta* suggest that the *bonâ fide* sale of a goodwill of a business is a transaction, which, for reasons of general expediency, outweighing the mischief of possible abuse, has been treated with peculiar indulgence by the Courts. And the same indulgence would probably be extended to all *bonâ fide* agency arrangements. But they are weighty to show that such indulgence may not be extended to an arrangement whereby a solicitor who for any reason may be unable to undertake the business of a particular client, should make a profit by recommending him to another.

## Alien enemy.

A sale to an alien enemy is illegal (*Brandon v. Nesbitt*, 6 T. R. 23).

## Restraint of trade.

A contract in restraint of trade *generally*, is bad as being deemed contrary to general utility. But this does not extend to agreements for a partial restraint, such as are made in the sale of the goodwill of a business; and it is established that a person may legally contract so as to restrain himself from carrying on a particular trade within certain limits, or even without limit, provided the restriction is reasonable having regard to the subject-matter of the contract (*Mitchel v. Reynolds*, 1 P. Wms. 181, and cases under this leading case in the first volume of Smith's Leading Cases; *Leather Cloth Co. v. Lhorsont*, L. R. 9 Eq. 345; *Collins v. Locke*, 4 Ap. Ca. 674; *Rousillon v. Rousillon*, 14

Ch. D. 351; *Middleton v. Brown*, 47 L. J. Ch. 411; 38 L. T. 334). PART III.

Another source of illegality in a bargain, is where the purpose of it is the *maintenance* of a suit by one who has no interest in the subject-matter. Maintenance and Champerty.

*Maintenance* (in this sense) is where a man (having no interest) maintains a suit or quarrel to the disturbance or hindrance of a right.

If he who maintains another is to have by agreement part of the land or debt, &c., in a suit, it is called *Champerty*: which is said to be the most odious species of *maintenance*.

*Maintenance* (including *champerty*) has been prohibited by several statutes which are confirmed by 32 H. VIII. c. 9.

The old law on the subject will be found laid down in Comyn's digest under the head "Maintenance," and a key to the cases will be furnished by the more recent cases of *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Robson v. Dodds*, L. R. 5 Eq. 301; *Anderson v. Radcliffe*, E. B. & E. 806.

The essence of the illegality, to render such a bargain void is that (1) there is the purpose of maintaining a suit by a person having no interest; and (2) the bargain contemplates a division of the proceeds. It is not champertous, nor is it unlawful for an attorney to take (*pendente lite*) an assignment of the subject-matter of the suit by way of security for his costs (*Anderson v. Radcliffe, supra*), though an out and out purchase by the attorney of the subject-matter would be illegal (*Simpson v. Lamb*, 7 E. & B. 34).

An agreement that the property of A. is to become upon his bankruptcy the property of somebody else is void as being a violation of the policy of the bankruptcy laws; this being in effect a stipulation that the property of the bankrupt which is by law divisible amongst his creditors shall be distributed in some other way (*Ex parte Macleay*, L. R. 8 Ch. 643; *Ex parte Williams*, *In re Thompson*, 7 Ch. D. 138; *Ex parte Jay*, *In re Harrison*, 14 Ch. D. 92; *Ex parte Jackson*, *In re Bowes*, 14 Ch. D. 725). These cases have to be distinguished from cases where there is a *bond fide* charge or lien over the pro- Contrary to policy of Bankruptcy Law.

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perty operative independently of bankruptcy, as in the case *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335.

In *Taylor v. Bowers*, 1 Q. B. D. 291, where the fraudulent purpose had not been carried out, the owner was held entitled to repudiate the purpose, and reclaim the goods.

Illegality by statute.

Illegality by statute may arise from an express or from an implied prohibition. Where the contract is expressly prohibited it is idle to consider the reason or ultimate purpose of the legislature in enacting the prohibition. As an instance of a contract directly prohibited I may cite *Lightfoot v. Tenant* (1 B. & P. 551), a case of goods sold for shipment contrary to the statute, 7 Geo. I. c. 22, protecting the East India trade. Other direct prohibitions are the Act 34 & 35 Vict. c. 101, s. 7, prohibiting sales of untested chain cables, and untested anchors above a certain weight; and the Act 30 Vict. c. 29 (commonly called *Leeman's Act*), making void, unless the shares are numbered, contracts for sale of shares in Joint Stock Banking Companies. See *Nelson Mitchell v. City of Glasgow Bank*, 4 App. Ca. 624.

Presumptions in regard to implied prohibition.

In regard to implied prohibitions, certain presumptions have been established by authority. It has been laid down that where a penalty is imposed once for all upon a certain course of dealing, and the only object of the enactment is security or convenience in the collection of the revenue, there is no inference of an intention to prohibit any particular contract which may be made in the course of such dealing: but if the penalty is imposed for the direct benefit of the general public (*e.g.* for the prevention of fraud, etc.), or if it is imposed in the way of a recurring penalty on each dealing (which amounts to an express prohibition of the dealing) the contract is void.

Authorities.

The authorities are the following:—*Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 B. & C. 93; *Smith v. Murrell*, 14 M. & W. 452 (cases under the Excise Licences Act):—*Cope v. Rowlands*, 2 M. & W. 149 (under 6 Ann. c. 16, where the penalty, on a broker selling stock without a licence, was imposed for *each offence*, and besides the Court held that one object of the statute was the security of the general public):—*Ferguson v. Norman*, 5 Bing. N. C. 76 (a case under the Pawnbroker's Act, decided on a similar principle):—*Little v. Poole*, 9

B. & C. 192; *Cundell v. Dawson*, 4 C. B. 376 (cases of sales of coal without delivering a ticket as required by the Coal Acts, the object of which was held to be to prevent fraud in the delivery of coals):—*Bensley v. Bignold*, 5 B. & Ald. 335 (where a printer, omitting to put his name on books printed, had violated the statute 39 Geo. III. c. 79, s. 27, which imposes a penalty for every copy published); *Forster v. Taylor*, 5 B. & Ad. 887 (sale of butter in firkins not branded in accordance with 36 Geo. III. c. 88); *Law v. Hodson*, 11 East, 300 (bricks under statutable size contrary to 17 Geo. III. c. 42); *Helps v. Glenister*, 8 B. & C. 553 (sale of live pheasants, contrary to 58 Geo. III. c. 75; see also *Loomes v. Baily*, 30 L. J. M. C. 31 (under 1 & 2 Will. IV. c. 32); *Ritchie v. Smith*, 6 C. B. 462 (Licensing Laws, 9 Geo. IV. c. 61); *Scott v. Gilmore*, 3 Taunt. 226 (Tippling Acts); *Tyson v. Thomas*, 1 McL. & Y. 119, and *Jones v. Giles*, 10 Ex. 119 and 11 Ex. 393 (Weights and Measures Acts); *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S. 588 (Lloyd's bonds, see also *In re Cork & Youghall Railway Co.*, L. R. 4 Ch. Ap. 748); Benjamin on Sales, 2nd ed., pp. 427—433.

In the Scotch Courts the principle has been long established (without the aid of any statute) that no action will lie on a **wager**, either to obtain money won or to recover money lost which has been actually paid. This is on the principle "that Courts were instituted to enforce the rights of parties arising from serious transactions and can pay no regard to *sponsiones ludicrae*." (Bell's Comm., Shaw's ed., p. 28.) This, however, appears not to have been the case by the common law of England, the decisions having recognized a wager as a lawful contract, provided it did not involve an impertinent inquiry or violate any rule of morality, or any recognized principle of public policy. In *Da Costa v. Jones*, 2 Cowp. 729, Lord Mansfield expressed his regret that it was too late to say that a wager could not be a good contract. And the same sentiment was expressed by Ashurst, J., in *Atherfold v. Beard*, 2 T. R. 615. In the same case, however, as well as in the subsequent case of *Good v. Elliot*, 3 T. R. 697, Buller, J., expressed his belief that it was not too late, and suggested that the judgment

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of the House of Lords in the Scotch case of *Bruce v. Ross*, 14 April, 1788, affirming the decision of the Scotch Court in conformity with the civil law, and the practice of other countries adopting the civil law, might be considered as overruling the decisions of inferior Courts in England. The subject is now in England regulated by statute, 8 & 9 Vict. c. 109, s. 18, which enacts that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void : and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any persons to abide the event on which any wager shall have been made : provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." It has been decided that a contract for sale and purchase of shares where neither party intends to deliver and accept the shares, but only to pay differences, is a mere wager and void within this section (*Grizewood v. Blane*, 11 C. B. 526), and so in any case where the contract is merely colourable and what is really intended is a wager (*Rourke v. Short*, 5 E. & B. 904). But the contract between a broker on the London Stock Exchange and the client who employs him to speculate is different. For although it was expected and intended by both that the transactions should result merely in the payment of differences : yet the result being that the broker was involved in real contracts on which, according to the rules of the Stock Exchange, he was personally liable : he was held entitled to recover from the client in an action for indemnity, and for his commission (*Thacker v. Hardy*, 4 Q. B. D. 685). The statute does not make the wager *illegal*, and, therefore, a partner or employer of an agent in betting transactions can recover his share of winnings from the other (*Johnson v. Lawley*, 12 C. B. 461; *Buston v. Buston*, 1 Ex. D. 13) : and one who has paid money at the request of another, for the settlement of losses on wagering transactions, is entitled to repayment, the request forming a good consideration (*Knight v. Cambus*, 15



C. B. 562; *Knight v. Fitch*, 15 C. B. 566; *Jessop v. Lutwyche*, 11 Ex. 614). And after some variance of opinion in the Courts of First Instance, it is now settled law that a deposit of stakes by one of the parties to a match may be recovered back on demand from the stakeholder as upon a void contract (*Hampden v. Walsh*, 1 Q. B. D. 189; *Diggle v. Higgs*, 2 Ex. D. 422, and *Trimble v. Hill*, 5 App. Ca. 342; *Batson v. Newman*, 1 C. P. D. 573). These cases overrule *Batty v. Marriott*, 5 C. B. 818.

In England the law against Sunday trading rests on the Sunday trading statute 29 Car. II. c. 7, which enacts (sect. 1) that “no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord’s day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of five shillings; and that no person or persons whatsoever, shall publickly cry, shew forth or expose to sale, any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord’s day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or shewed forth or exposed to sale.”

The reported decisions under the statute are not numerous:—In *Drury v. Defontaine* (1808), 1 Taunt. 131, a sale of a horse on Sunday by private bargain by a person whose calling was said to be that of a *horse auctioneer*, was held not contrary to the statute. Doubts have been thrown on this decision in the subsequent cases of *Fennell v. Ridler* and *Smith v. Sparrow* cited below. In the latter case it was suggested by Park, J., that the sale, if not within the “ordinary calling,” might have been void within the statute as “worldly labour.” There can be no doubt, however, on the general tenor of the decisions, that the words in the statute “of their ordinary calling” must be read in connection with all the previous expressions, “worldly labour, business or work,” and this is assumed in the judgment in the leading case of *Fennell v. Ridler*. The real absurdity of *Drury v. Defontaine* consists in the classing of the business of

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*horse auctioneer* as a calling distinct from that of a person *selling* horses by private contract.

The case of *Fennell v. Ridler* (1826), 5 B. & Cr. 406, ~~was~~ also a case of horse dealing. The judgment of the Court, delivered by Bailey, J., corrected a doubt expressed by him in *Bloxome v. Williams* whether the "business" referred to in the statute must not be something of the nature of manual labour, and established the principle that the statute must be liberally construed according to its spirit, and as including every species of labour, business, or work, whether public or private, in the ordinary calling of the doer of it.

*Bloxome v. Williams* (1824), 3 B. & Cr. 406, was an action on a warranty on the sale of a horse: and the grounds of decisions were 1st, that, although there was a verbal bargain on the Sunday there was nothing to make it binding under the Statute of Frauds until the following Tuesday when the horse was delivered, and the contract was therefore not completed on the Sunday so as to come within the statute; and 2ndly, that the defendant (the vendor) was not known by the buyer to be a horsedealer, and was therefore not entitled to set up the wrong which was solely his, against the "innocent" bargainer.

If goods are delivered under a contract of sale made on Sunday, as in the case of any other illegal sale, the contract is *executed* and the property passed; and on the maxim *in pari delicto potior est conditio possidentis*, the vendor can recover neither the goods nor the price. It seems also the better opinion (though contrary to the decision in *Williams v. Paul*, 6 Bing. 653), that a subsequent promise to pay for the goods so delivered is without any consideration so as to ground any legal obligation (*per* Parke, B., in *Simpson v. Nicholls*, 3 M. & W. 244, as corrected by subsequent report, 5 M. & W. 702; the same in *Scarfe v. Morgan*, 4 M. & W. 270, 281.).

The case of *Scarfe v. Morgan*, 4 M. & W. 270, was that of a mare sent to be covered on Sunday, and the question arose out of a claim of lien made by the defendant for the price of that and other similar services. It was held that (whether the transaction was lawfully entered into or not, and assuming that the legal effect of such a contract, if lawfully made, was to give a lien) the contract being executed the special property passed and the lien attached.

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### THE STATUTORY REQUISITES.—THE 17TH SECTION OF THE STATUTE OF FRAUDS.

This section is as follows:—"AND BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, THAT FROM AND AFTER THE SAID FOUR-AND-TWENTIETH DAY OF JUNE (1677), NO CONTRACT FOR THE SALE OF ANY GOODS, WARES, AND MERCHANDIZES, FOR THE PRICE OF TEN POUNDS STERLING OR UPWARDS, SHALL BE ALLOWED TO BE GOOD EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME, OR GIVE SOMETHING IN EARNEST TO BIND THE BARGAIN, OR IN PART OF PAYMENT, OR THAT SOME NOTE OR MEMORANDUM IN WRITING OF THE SAID BARGAIN BE MADE AND SIGNED BY THE PARTIES TO BE CHARGED BY SUCH A CONTRACT, OR THEIR AGENTS THEREUNTO LAWFULLY AUTHORISED."

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In this part of the work I shall consider *first*, to what contracts the statute applies; and *secondly*, the requirements of the statute, namely, (A.) acceptance and actual receipt, (B.) earnest, (C.) the note or memorandum in writing.

#### SECTION I.—TO WHAT CONTRACTS DOES THE STATUTE APPLY.

GOODS, WARES, AND MERCHANDIZES.—The words "goods, wares, and merchandizes," within this enactment, apply to all *goods*<sup>1</sup> as above defined (p. 3), *i.e.*, to every species of tangible chattel not being a ship. With regard to ships it has been the custom in England from a very early period to deal with the property by written documents (Bell's Commentaries, ed. Shaw,

What are  
"goods, wares,  
and merchandizes."

<sup>1</sup> Blackburn on Sale, pp. 3, 6.

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371), and this probably has made it unnecessary to consider whether or not they come within the Statute of Frauds. There seems, however, no doubt that an executory contract for building a ship, is under this statute and Lord Tenterden's Act, to be presently cited, a sale of goods, &c., within these enactments.

*Res incorporales*  
not.

The words "goods, wares, and merchandizes," do *not* comprise any species of intangible property (*res incorporales*), such as shares in a railway company<sup>1</sup> (*Duncuft v. Albrecht*, 12 Sim. 189; *Tempest v. Kilner*, 3 C. B. 249; *Boulby v. Bell*, 3 C. B. 284; 16 L. J. C. P. 18); in a banking joint stock company (*Humble v. Mitchell*, 11 A. & E. 205); in a mining company (*Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53); Spanish bonds to bearer (*Heseltine v. Siggers*, 1 Ex. 869; 18 L. J. 166); scrip (*Knight v. Barber*, 16 M. & W. 70);—these being all mere choses in action legal or equitable.

Emblements,  
tenants' fixtures,  
quære?

Whether or not these words "goods, wares, and merchandize" comprise *emblements, or tenants' fixtures* (so far as relates to the tenant's right to seize and take them away), is a question involved in some difficulties.

To clear the points from confusion I must revert to the distinction (see p. 2, *supra*) between an executory and an executed contract. An agreement to transfer the property in something that is attached to the soil at the time of agreement, but is to be severed from the soil and become goods *before* the property is transferred, is an executory contract for the sale of goods. Such a contract, if not within the original Statute of Frauds, is clearly within the statute as extended by Lord Tenterden's Act, to be presently mentioned (p. 162, *infra*). Under such a contract it is unimportant for the purposes of the statute, to consider whether the thing while remaining attached to the soil comes under the word "goods" or not. But when the agreement is that the *property* is to be *transferred before* the thing is severed, there is a question whether there is a contract

<sup>1</sup> It is also decided that shares in a railway company are not an interest in land within the 4th section of the statute. (*Duncuft v. Albrecht, supra*; *Bradley v. Holdsworth*, 3 M. & W. 422).

for the sale of "goods" within the statute. There is also a question whether the contract is one for the sale of an interest in land within the 4th section of the statute. And although the answer in the negative to this last question does not necessarily involve an affirmative answer to the other, it may be useful to refer to the decisions upon both points.

Reverting to the distinction which has been made between *natural* and *industrial* fruits (see p. 15 *supra*), it is clear on the authorities that a contract for the sale of the *growing natural* produce, such as the fruit of a pear-tree (*Rodwell v. Phillips*,<sup>1</sup> 9 M. & W. 502), or of the growing underwood in a plantation (*Scorell v. Boxall*, 1 Y. & Jerv. 396), to be afterwards gathered or cut *by the purchaser*, is a contract for the sale of an interest in land and not of goods (see also *Carrington v. Roots*, 2 M. & W. 248; *Seal v. Auty*, 2 Br. & B. 99, 100; *Crosby v. Wadsworth*, 6 East, 602). Although if the intention is that the produce shall be *immediately* severed, even by the purchaser, there is a sale of goods and not of an interest in land (*Marshall v. Green*, 2 C. P. D. 35).

But where the subject of the contract is the right to sever Emblements and take away *fructus industriales*, the authorities are conflicting. The difficulty is raised by the circumstance that emblements are as to certain effects treated by law as chattels. These effects, though of wide operation, are exceptions to the general principles of law: and there remain many effects in regard to which *fructus industriales* are considered part of the land. For instance, they could not, at common law, be the subject of larceny (*per* Lord Ellenborough in *Parker v. Staniland*, 11 East, 365). And if belonging to the person who is seized in fee of the land, they will pass by a conveyance of the land (*Grantham v. Hawley*, Hob. 132: Gilbert on Evidence, 214); and a sale of them by such person to the incoming tenant is a sale of an interest in land within the 4th section (*Lord Falmouth v. Thomas*, 1 Cr. & M. 89; *Mayfield v. Wadswley*, *per* Littledale, J., 3 B. & C. 366). On principle, and apart from the authorities to be presently cited, I should have thought it a sound view, and consistent with the authorities

<sup>1</sup> This was a decision under the Stamp Act relating to a "contract for the sale of goods, wares, and merchandizes."

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upon cognate points, to have held that *fructus industriales* sold as growing crops and to be severed by the purchaser, are not goods, but constitute an interest in land within the 4th section of the statute. But the actual authorities are conflicting.

In *Parker v. Staniland* (11 East, 365), the sale was of potatoes to be got out of the ground *immediately* by the purchaser, and the Judges of the King's Bench (Lord Ellenborough, C.J., Grose, Le Blanc, and Bailey, JJ.) agreed in the opinion that this was not a contract for the sale of an interest in land within the 4th section.

In *Emmerson v. Heelis* (2 Taunton, 38) the opinion of the Court of Common Pleas, delivered by Sir James Mansfield, a few days before the decision in *Parker v. Staniland*, was to a contrary effect. The sale was on the 25th of September, of turnips to be removed by the purchaser; the time for payment to be until the 1st of January following, but no time being expressly stipulated for the removal. The sale was in lots, and the Court having decided that each lot formed a separate contract, so that the price was under £10, the next question was whether it was a sale of an interest in land within the 4th section, and the Court held that it was, but that the statute was satisfied by the signature of the auctioneer.

The only appreciable difference between the two cases is, that in *Emmerson v. Heelis* there was room for the argument, which was used, that the turnips were still *growing* and might before removal derive some benefit from the soil; whereas the potatoes in *Parker v. Staniland* were to be taken up immediately, so that they could derive no further benefit.

*Parker v. Staniland* is followed in *Warwick v. Bruce* (1813, 2 M. & S. 205), where the contract was made, on the 12th of October, for the sale of potatoes to be dug up by the purchaser.

In *Evans v. Roberts* (1826, 5 B. & C. 828), the potatoes were to be dug by the seller, so that there was really no occasion to discuss *Emmerson v. Heelis*; but nevertheless Bayley, J., and Littledale, J., gave opinions contrary to that of Sir J. Mansfield in that case.

In *Jones v. Flint* (1839, 10 A. & E. 754), where (by a contract made in August) crops, including potatoes, to be cut and

dug by the purchaser, were sold by parol, the Court, by a judgment delivered by Denman, C.J., decided that the sale was not of an interest in land within the 4th section.

The last cited decision was directly contrary to the opinion of Sir J. Mansfield in *Emmerson v. Heelis*, and goes far to justify Mr. Benjamin (Sales, 2nd ed. p. 98), in treating *Emmerson v. Heelis* as practically overruled on this point. Mr. Blackburn, however, more cautiously, leaves the authorities to speak for themselves; but points out a misapprehension of Bailey, J., who in his own unnecessary opinion, delivered in *Evans v. Roberts*, treats the opinion of Sir J. Mansfield in *Emmerson v. Heelis* as a *dictum* unnecessary for the decision of the case. The same misapprehension is repeated by Denman, C.J., in *Jones v. Flint*, and, less excusably (after Mr. Blackburn's observation), by Mr. Benjamin himself.

That *fructus industriales* sold as growing crops and to be severed by the purchaser, are goods within the 17th section does not necessarily follow, although they may not be an interest in land. The opinion of Bayley, J., in *Evans v. Roberts*, is to the effect that they are goods. But Mr. Blackburn's opinion, as given in his book on Sale, is decidedly to the contrary. After observing that an agreement to transfer the property in a thing attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods *before* the property is transferred is an executory sale of goods, he says (p. 9):—"And when the agreement is that the property is to be transferred before the thing is to be severed, it seems clear enough, that it is not a contract for the sale of goods, it is a contract for sale, but the thing to be sold is not goods." And further on (p. 20) the same learned author observes that in *Hallen v. Runder* (in 1834, 1 C. M. & R. 267), it was expressly decided, that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of goods, either within the Statute of Frauds or the meaning of a count for goods sold and delivered. The principle of *Hallen v. Runder* was approved and followed by the Queen's Bench Division in *Lee v. Gaskell*, 24 W. R. 824.

I know of no express decision whether or not a sale of the right of a tenant to sever and take away fixtures is a sale of an

Tenants' fixtures.

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interest in land within the 4th section. If the argument of Bayley, J., in *Evans v. Roberts* were followed, such fixtures would be, for the purposes of the Statute of Frauds, in every respect assimilated to emblements. But the purposes for which tenants' fixtures are by law treated as chattels, are much more limited than in the case of emblements (*supra*, p. 17). Perhaps the question may, as in the case of seizure under a writ of execution, depend upon whether the interest of the tenant in the land was a chattel or a freehold interest.

Executory con-  
tracts.  
Lord Tenterden's  
Act.

Whether the 17th section of the Statute of Frauds applied to executory contracts was long an unsettled point. The difficulty was removed by Lord Tenterden's Act (1828, 9 Geo. IV. c. 14, s. 7), which, after reciting the above section of the Statute of Frauds, and a similar enactment in an Irish Act of the 7th year of Wm. III., enacted as follows:—"That the said enactments shall extend to all contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made or procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or for rendering the same fit for delivery."

"For the price  
of £10 sterling."

FOR THE PRICE OF £10 STERLING OR UPWARDS.—"It is now well settled," says Jervis, C.J., in *Hurman v. Rye* (May 31, 1856, 25 L. J. C. P. 257), "that the section of Lord Tenterden's Act and the 17th section of the Statute of Frauds are to be read together." The effect of that is to substitute the words "of the value" for "for the price," in the 17th section of the statute, which accordingly will read thus:—"No contract for the sale of any goods, wares or merchandizes, of the value of £10 sterling or upwards, shall be allowed to be good except, &c." See also *Watts v. Friend* (10 B. & C. 446).

The cases previous to Lord Tenterden's Act, and in which the decisions were conflicting, often turned upon the question, whether the alleged obligation arose out of an executory contract of sale, or was incurred for work and labour done and materials supplied.



These cases are collected and fully commented on in Blackburn on Sale, pp. 7, 8, and Benjamin on Sale, pp. 75, *et seq.*; and are the following:—*Towers v. Osborne* (1 Strange, 506); *Clayton v. Andrews* (4 Burr. 2101); *Groves v. Buck* (3 M. & S. 178); *Astey v. Emery* (4 M. & S. 262); *Rondeau v. Wyatt* (2 H. Bl. 63); *Garbutt v. Watson* (5 B. & A. 613); *Atkinson v. Bell* (8 B. & C. 277); *Cobbold v. Caston* (1 Bing. 399).

Lord Tenterden's Act has simplified the questions which arise out of a contract to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is transferred. It has been long settled by authority that such a contract is an agreement for the sale of goods within the meaning of the Statute of Frauds combined with Lord Tenterden's Act. Blackburn says (p. 9):—"The agreement is that the thing shall be rendered into goods and in that state sold, it is an executory agreement for the sale of goods, not existing in that capacity at the time of the contract."

This was, in effect, decided by the Court of King's Bench, in *Smith v. Surnam* (9 B. & C. 561), independently of the Act. The decision was in 1829 and the contract and commencement of the action were doubtless before the 1st of January in that year, when the Act came into operation. The contract was for the sale to the defendant of timber then growing on plaintiff's land, at so much a foot, to be carried away by defendant, and evidence was given that it was part of the contract that plaintiff should fell the trees. The Court held the intention to be that no property should pass until the trees were cut, and that the subject of the sale was the timber when felled, so that there was a sale of goods within the 17th section. In a recent decision of the Common Pleas Division (*Marshall v. Green*, 1 C.P.D. 35), it was decided that although the purchaser were to fell the trees, yet, the intention being that this should be done *as soon as possible*, the sale was not of an interest in land, but a sale of goods. The Statute was however satisfied, as there had been an actual receipt of part.

*Blackburn*, in his Treatise on Sale, published in 1845, and

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seventeen years after Lord Tenterden's Act, states that the section of that Act above cited had then not yet been made the subject of litigation, "and indeed," he says, "it seems as plain as words can make it."

Questions as to  
executory con-  
tracts not de-  
pending on Lord  
Tenterden's Act.

Questions have since arisen in another form arising out of the distinction between an executory contract of sale, and work and labour, &c.

*Grafton v. Armitage* (1845, 2 C. B. 336) was a case where the plaintiff was employed by defendant to devise a method of curving metal tubing for the purpose of more effectually carrying out the manufacture of life buoys of a description of which the plaintiff was patentee. Plaintiff brought his action for work, labour, and materials, and got a verdict. It was contended on the part of the defendant that the true nature of the transaction alleged was a sale, but the plaintiff was held entitled to recover under the count for work, &c.

In *Clay v. Yates* (1856, 1 H. & N. 79), the plaintiff, a printer, verbally agreed to print for defendant 500 copies of a treatise; the defendant, who was the author, revising the proof sheets in the usual way. The action was for work done and materials supplied in printing; and the objection was taken that the contract was for the sale of goods and the Statute of Frauds was not satisfied. The objection was overruled. The Chief Baron Pollock thought that the work and labour was the essence of the contract and the materials merely ancillary. Martin, J., thought it material that the work to be done was not wholly the work of the printer, the sheets having to be revised by the author. That the work and labour was the essence of the contract and the materials merely ancillary was clearly not a sufficient view of the situation. In truth the printed sheets were never, as such, the property of the printer, being all along, subject to the printer's lien, part of the literary property of the author; so that the essence of an executory contract, whereby goods are to be produced and when produced the property in them transferred, is entirely wanting.

In *Lee v. Griffin* (1 B. & S. 272, 30 L. J. Q. B. 252), the question arose out of a verbal order for two sets of artificial teeth to be made to fit the mouth of the employer. She died

before they could be so fitted, and an action was brought against her executors for the contract price. It was held that the contract was an executory contract of sale, and being rendered incapable of performance owing to the death of the lady, her representatives were absolved from payment. The criterion adopted by the Chief Baron Pollock in *Clay v. Yates*—as to the work being the essence of the contract and the materials merely ancillary—was disapproved of, and the decision based upon a safer principle, which is well put by *Blackburn, J.*, thus:—"If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is a familiar instance of the latter proposition; and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered."

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It was at one time doubted whether the 17th section of the Statute of Frauds applied to sales by auction. The point was settled by the decision of the King's Bench in the case of *Kenworthy v. Schofield* (1824, 2 B. & C. 945). It was held that the contract being verbal merely, could not be enforced, and this decision has ever since been acted on.

The statute applies to sales by auction.

The question is sometimes raised whether the sale alleged was one entire contract. This may be important, both for determining whether the contract is for goods of the value of £10 or upwards, and also whether the goods accepted and received were part of the goods sold under the contract.

Whether the sale is one entire contract.

Where one order is given at the same time for several classes of goods, the presumption is that the transaction is a single and entire contract (*Champion v. Short*, 1 Camp. 53), and this holds even when some of the goods are not in existence at the time of the contract. So in *Baldey v. Parker* (3 D. & R. 221), it was held that the whole order being of goods of more than £10 value, could not be split up into different contracts of smaller amounts so as to be taken out of the Statute of Frauds,

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In *Elliot v. Thomas* (3 M. & W. 170), the plaintiff's traveller took from the defendants a verbal order for five bundles of common steel, at 34s., and five bundles of cast steel, at 48s., of a specified thickness. Parke, B., in delivering judgment, said : — "That was a joint order for common steel and cast steel ; the effect of such joint order, unless explained, would be to make it one entire contract ; since we must assume that one article would not have been furnished at one stipulated price unless the other had been agreed to be paid for at the other price." The case of *Scott v. E. C. Ry. Co.*, 12 M. & W. 33, was a case where one article comprised in the order required to be specially made. The rest were delivered in terms of the order and accepted. This was held to make the whole contract good, including the article which had to be made. So in *Jenner v. Smith* (L. R. 4 C. P. 270), a verbal bargain was made at a fair for two pockets of hops, which were then and there inspected, and for two more of which samples were shown, but were part of a lot, belonging to the vendor, in a warehouse in London. This was ruled to be one contract, and as there had been a delivery of the first two pockets the statute did not apply in respect of the other two.

Where different lots at an auction are bought by the same purchaser there is a separate contract for each lot (*Roots v. Lord Dormer*, 4 B. & Ad. 77 ; *Emmerson v. Heelis*, 2 Taunt. 38 ; and *per Lord Chelmsford* in *Couston v. Chapman*, L. R. 2 H. of L. App. Sc. 252). And a contract for twenty-four numbers of a periodical work to be delivered monthly at £1 1s. has been held separable (*Mavor v. Pyne*, 3 Bing. 285). In the following circumstances the legal inference was held to be that the transactions were separate ;—Defendant ordered from plaintiff's traveller one cask of cream of tartar, and at the same time made an offer to purchase two chests of lac dye at a price less than the traveller had authority to take. Plaintiff then sent both the cream of tartar and the lac dye, and defendant took the first, but refused the latter. It was held that the order was divisible, and that there was no binding contract for the lac dye (*Price v. Lea*, 1 B. & C. 156).

Whether parcel  
contract is good

The question has been raised whether a contract for sale

which was in writing and good under the Statute of Frauds was rescinded by a parol agreement, the object of which was to set aside the first contract and substitute a new one. It was held that, although a parol agreement to rescind *simpliciter* a previous contract may be good (*Lavery v. Turley*, 30 L. J. Ex. 49), the parol agreement in question being within the scope of the 17th section of the Statute of Frauds and not satisfying the statute, could not be "good" to any purpose, and therefore could not operate as a rescission of the first contract (*Noble v. Ward*, L. R. 1 Ex. 117, affirmed Ex. Ch. L. R. 2 Ex. 135 ; compare *Sanderson v. Graves*, L. R. 10 Ex. 234, a case under the 4th section). A direction given (simultaneously with an order for goods) as to the route by which the goods are to be sent, does not (the order having been accepted and acted on) necessarily constitute a term of the contract, and so, although the goods were sent by a different route, the assent of the buyer to the adoption of such different route need not be proved in a manner to satisfy the Statute of Frauds (*Leather Clothing Co. v. Hieronymus*, L. R. 10 Q. B. 140). Where delivery, stipulated for by monthly quantities, has been withheld by vendor at purchaser's request, the former is entitled to maintain an action upon the original contract (and without the necessity of alleging a new contract which would have been required to satisfy the statute), he being ready and willing to deliver within a reasonable time after the last request of the defendant to withhold delivery (*Hickman v. Haynes*, L. R. 10 C. P. 598). But if the vendor has withheld delivery, not at purchaser's request, so that he cannot show that he was ready and willing to deliver within the period named for performance, he cannot rely upon a tender in pursuance of the request of the purchaser after the period for performance has expired, as a tender under the original contract (*Plevins v. Downing*, 1 C. P. D. 220).

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as a rescission  
of a prior binding  
contract.

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## SECTION II.—THE REQUIREMENTS OF THE STATUTE.

(A.) *Acceptance and Actual Receipt.*

Acceptance and  
actual receipt.

Order of time  
indifferent.

“EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME.”

This consists in fact of two requirements, *acceptance and actual receipt*. Both must exist in order to satisfy the statute, and the order of time in which they occur is indifferent.

The usual order of events appears inverted in the wording of the statute. It would usually occur that the actual receipt of the goods would precede acceptance. It is not, however, necessary that the acceptance should follow or be contemporaneous with the receipt of them. Acceptance prior to actual receipt will satisfy the statute. In the case of *Cusack v. Robinson* (May 25th, 1861, 1 B. & S. 299), the defendant, having examined at Liverpool several of a lot of 156 firkins of butter, verbally agreed with the plaintiffs to purchase the whole of them, and directed that they should be sent by carriers whom he named, to Fenning's Wharf, London. The 156 firkins were accordingly delivered by the plaintiff to the carriers, and by the carriers in due course to Messrs. Fenning (who acted as warehousemen for defendants) at their said wharf. It was held that there was a sufficient “actual receipt” by the defendant, and also that, the defendant having selected at Liverpool the specific firkins, there was an “acceptance” by him within the requirements of the statute.

The same case furnishes authority for the principle that both acceptance and actual receipt are required to satisfy the statute. In giving judgment (1 B. & S. p. 306) Blackburn, J., observed, “The words of the statute are express, that there must be an acceptance of the goods, or part of them, as well as an actual receipt; and the authorities are very numerous to show that both these requirements must exist, or else the statute is not satisfied.” A direct authority upon the point is furnished by the case of *Smith v. Hudson* (6 B. & S. 431), and the principle must now be taken as conclusively established by authority.

It being clearly established that, in order to satisfy this

clause of the statute there must be both acceptance and actual receipt of part at least of the goods, it becomes necessary to consider separately—

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- I. What constitutes acceptance; and
- II. What constitutes actual receipt.

I. “An acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reason at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts” (Blackburn on Sale, p. 23). As a definition so far identical, though less complete, may be cited the following:—“The acceptance must be by some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as would reasonably lead to that conclusion” (*per* Bramwell, B., at *Nisi Prius*, in *Bowes v. Pontifex*, 3 F. & F. 739).

What constitutes acceptance.

The outward acts by which this intention is or is not signified, or which furnish or fail to furnish evidence of acceptance, will now be considered. And,—

How signified.

- 1st. What outward acts do not amount to evidence of acceptance:—

Acts which are not evidence of acceptance.

(a.) It is clear upon the authority of numerous cases, as well as from the very notion of acceptance above stated, that neither a carrier nor a warehouseman has any implied authority to accept the goods (Blackburn on Sale, p. 27; *Hanson v. Armitage*, 5 B. & A. 557; *Johnson v. Dodyson*, 2 M. & W. 656).

(a) Delivery to carrier or warehouseman.

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This is true although the goods are shipped on board a vessel employed or chartered<sup>1</sup> by the purchaser (*Acebal v. Levy*, 10 Bing. 376), or lodged with the warehouseman or wharfinger appointed by him to receive them (*Hunt v. Hecht*, 8 Exch. 814). Nor can acceptance be inferred from the mere circumstance that the *transitus* is at an end, the vendee not having dealt with the property in the goods. In the case of *Smith v. Hudson*, above referred to (p. 168, *supra*, 6 B. & S. 431), the defendant, who was the vendor, had entered into a verbal engagement with the bankrupt to sell him 48½ quarters of barley according to a sample shown, to be delivered at S. Station on the Great Eastern Railway. Defendant, on 7th November, took the barley in his own waggons to the goods shed of S. Station with a delivery note addressed to the station master placing the goods at the disposal of the bankrupt, so that if there had been a sale the vendor's lien and right to stop *in transitu* would have been at an end. On the 11th November (the adjudication in bankruptcy having taken place in the meantime, but the assignees not having interfered with the barley) the defendant gave notice to the station master not to deliver it except to his own order. It was held that there had been no acceptance to satisfy the Statute of Frauds, and therefore no binding contract; and, the defendant having, as undivested owner, countermanded his instructions to the station master, the power to bind the contract by acceptance was gone and could not be exercised by the assignees. Further illustration is furnished by the cases of *Nicholson v. Bowes* (1 E. & E. 172) and *Taylor v. Wakefield* (6 Ell. & Bl. 765).

<sup>1</sup> The word "chartered" is here used in the strict sense, i.e., under a mere contract of charter party, there being no demise of the ship so as to make the charterer owner *pro tempore*, and to render the master of the vessel his servant. On this distinction see *post* as to stoppage *in transitu*. I may here note that the *nisi prius* decision of Chambre, J., in *Hart v. Sattley* (1814, 3 Camp. 528), to the effect that the merchant by employing a

particular ship constitutes the master his agent to accept the goods, has long been treated as overruled (Blackburn on Sale, p. 27). *Hart v. Sattley* was indeed cited by Lord Campbell in the case of *Morton v. Tibbett*, to be presently considered, but the same judge in a later case expressly declared his concurrence in the view that that decision was not law (*Meredith v. Meigh*, 1853, 2 E. & B. 371).



(b.) The mere delivery of the goods to the buyer himself does not amount to evidence of acceptance, except so far as to throw the *onus* upon him of showing a prompt rejection of them. This is clear from what is said above as to the distinction between acceptance and actual receipt, and is further illustrated by the case of *Kent v. Huskisson* (3 B. & P. 233).

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(b) Mere  
delivery to  
buyer himself.

In the case of *Maberley v. Sheppard* (1833, 10 Bing. 99), the question arose out of an executory contract to make a waggon. The fact that the intending purchaser was present at an operation of the manufacture previous to the finishing, was held not to amount to evidence from which alone acceptance might be inferred.

A further illustration of a state of facts which do not amount to evidence of acceptance is furnished by the case of *Lillywhite v. Devereux*, more at length referred to in the following page.

2ndly. *What outward acts afford conclusive proof of acceptance.*

Acts which conclusively prove acceptance.

(a.) The order or selection of goods *in specie* (i.e., in the actual bulk), by the vendor having the opportunity of examining or testing them is conclusive of the fact of acceptance within the statute (*Cusack v. Robinson*, 1 B. & S. 299; *Castle v. Sworder*, 6 H. & N. 828; *Kershaw v. Ogden*, 3 H. & C. 717). And, whether he has the opportunity of testing them or not, if the contract was to take those identical goods absolutely, and not merely that he was to take them if they answered a certain description, there is no further question as to acceptance (*Pettit v. Mitchell*, 4 M. & G. 819). Here the question was whether a right to measure the goods was a condition precedent to payment, but the case fairly illustrates the point as to acceptance.

(a) Selection of goods in bulk.

(b.) Acceptance within the statute is conclusively inferred, when a sample is delivered to the purchaser, and kept by him as part of the bulk sold (*Hinde v. Whitehouse*, 7 East, 558; *Klinitz v. Surry*, 5 Esp. 267; *Gardner v. Grout*, 2 C. B. N. S. 340).

(b) Retention of bulk sample.

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Relevant facts  
from which  
acceptance may  
be inferred.

(a) Where goods  
are already in  
buyer's posses-  
sion, any act  
indicating the  
intention  
sufficient.

3rdly. *What outward acts are evidence of acceptance (i.e., relevant facts from which acceptance may be inferred).*

(a.) Where the goods are already in the possession of the buyer, as agent for the vendor or otherwise, the question of acceptance is purely one of intention, and the outward acts in such a case being often ambiguous, the inference is for a jury to draw whether he intended to take to them and has taken to them as purchaser. An illustration of this is the case of *Edan v. Dudfield* (1 Q. B. 302). Here the defendant, holding the goods as the plaintiff's bailee, with a written authority to sell them, made a contract with the plaintiff (according to the parol evidence) to purchase on his own account. He afterwards sold them at (it seems) a lower price (see as reported in 5 Jurist, 317), and afterwards rendered an account to the plaintiff, giving credit for the latter price only, and debiting plaintiff with commission and charges as on an agency transaction. It was held that there was evidence of acceptance within the Statute of Frauds, and the plaintiff, having a verdict, was held entitled to recover the price upon the sale to defendant as proved by the parol evidence. "We have no doubt," says Lord Denman, delivering the judgment of the Court (Lord Denman, C. J., Littledale, Williams and Coleridge, JJ.), "that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties, which amount to acceptance; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion, after fully considering the cases cited, especially *Elmore v. Stone* (1 Taunt. 458); *Nicholl v. Plume* (1 C. & P. 272), and *Maberley v. Sheppard* (10 Bing. 99); agreeing that such evidence must be unequivocal, but thinking the question, whether it is so or not, under all the circumstances, fact for the jury, not matter of law for the Court.

There must, however, be some outward act reasonably capable of construction as indicating the intention of ownership. A case where any such act failed to appear is that of *Lillywhite v. Devereux* (15 M. & W. 285). The defendant occupying a furnished house as tenant of the plaintiff who held

the house as tenant of A., verbally agreed with the plaintiff for the purchase of the furniture. It appeared that the agreement for the purchase of the furniture was made with reference to an arrangement including a transfer of plaintiff's tenancy under A. to the defendant, but A. refusing his consent, this arrangement could not be carried out. The defendant had remained in the house after a valuation had been taken and until the refusal of consent by A. had been ascertained, and this appears to have been the only evidence offered of acceptance within the statute. It was held not to amount to such evidence, there being no reasonable inference of any intention to hold the furniture as owner, except under an arrangement which had gone off. Another illustration is furnished by *Jordan v. Norton* (4 M. & W. 155); the case of a mare, taken home by the defendant's son, whose authority the Court held, upon the defendant's letters before them, to have been merely conditional upon getting a warranty which was never given.

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(b.) Acceptance within the statute may be inferred from retention by the purchaser of the goods or part of them for such a time as might reasonably tend to the conclusion that he meant to keep them as his own (*per* Bramwell, B., in *Bowes v. Pontifex*, 3 F. & F. 739; *Coleman v. Gibson*, 1 M. & Rob. 168). Whether such inference was reasonable in the circumstances ought to be left as a question for the jury (*Phillips v. Bistolli*, 2 B. & C. 511).

(b) Retention  
for long time.

In the case of *Bushel v. Wheeler* (1844, 15 Q. B. 443 n.; 8 Jur. 532), the goods in question had been warehoused in a warehouse belonging to the carrier (the owner of the *Hereford Sloop*) and there appears to have been some evidence that the purchaser treated that warehouse as his own. Notice had been given to the purchaser that the goods were at the warehouse, and five months elapsed without his making any communication to the vendor rejecting the goods. At the end of that time he became bankrupt. It was held that there was evidence of acceptance within the statute.

On the other hand, in the case of *Norman v. Phillips* (1845, 14 M. & W. 277), where timber was sent by order of defendant to the Paddington Station of the Great Western Railway, and

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the defendant, a month after receiving the invoice, informed plaintiff that he declined to take the goods, it was held that (although there might be a *scintilla* of evidence of acceptance according to the principle of *Bushel v. Wheeler*) there was not sufficient evidence to warrant a verdict for the plaintiff. The distinction made was to this effect: a purchaser may (as in *Bushel v. Wheeler*) constitute the carrier his warehouseman, and then by delay in intimating rejection of the goods afford a presumption that he intended to keep them. But he does not by mere delay in intimating his rejection, constitute the carrier his agent to accept the goods.

The case of *Sanders v. Jameson*, reported on trial at *nisi prius*, 2 C. & K. 557, furnishes an illustration of the same principle. The question was, however, not upon the Statute of Frauds, but as to the buyer's right to reject the goods as not according to sample. It was proved that, according to the usage of the market (the Liverpool corn-market), if the buyer does not on the day the corn is sold examine the bulk and reject it, he cannot afterwards reject it or refuse to pay the price. Rolfe, B., directed the jury that this was a reasonable usage, and held in effect that the buyer having taken the corn into his possession after the time allowed by the usage for inspection, must be considered as having finally accepted it.

(c) Acts of  
ownership.

(c.) If the vendee does any physical act upon the goods other than what is strictly necessary for seeing whether they correspond to sample or order, it is for a jury to draw the inference as to the intention of the act, and they may draw the inference of an intention to accept.

*Parker v. Wallis* (1855, 5 E. & B. 21), is an illustration. This was a case where turnip-seed had been sent to defendant in pursuance of an alleged order, and the vendee had spread it out thin to dry it. As to his motive for doing so there was conflicting evidence. The judge at the trial had directed a non-suit. On the question whether the non-suit was right, coming before the Court in *banc*, Crompton, J., thought the act explainable on three suppositions: 1st. That it was done by the authority of the plaintiff; 2ndly. For the benefit of the seed, being a perishable article; 3rdly. As owners. The Court

held that the direction for a non-suit had been wrong, and that there was evidence of acceptance for a jury.

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The case of *Curtis v. Pugh* (1847, 10 Q. B. 111), seems at first sight difficult to reconcile with *Parker v. Wallis*, and Mr. Benjamin, in his book on Sale (p. 120), considers them irreconcilable. The sale was of hogsheads of glue, and the stuff had been turned out by the defendant (buyer) and put into bags. Lord Denman directed the jury that *if the defendant had done any act altering the condition of the article that was an acceptance*, and on this the plaintiff had a verdict. Lord Denman subsequently admitted that this direction was wrong, and the Court in *banc* agreed with him. The only point decided was that the above-mentioned act alone was not acceptance; and this is quite consistent with *Parker v. Wallis*. It was virtually admitted that if the question of intention to take the goods as owner had been left to the jury they would have negatived it.

In *Richard v. Morse* (C. A. from Ex. Div. June 25, 1878), the plaintiff had sold to defendant six bales of wool by sample. The bales were despatched by railway and arrived at the station, where, on the 31st July, the defendant sent his cart for them. On the same day the defendant wrote to the plaintiff that he had received and unpacked the wool, and that two bales were inferior to sample and that he returned a portion from each and added, "Please say what is to be done in the matter." On the 4th of August the defendant both by telegram and letter informed the plaintiff that he could not take the wool, and returned it. A jury found that the wool was not equal to sample.<sup>1</sup> Hawkins, J., gave judgment in favour of the defendant, and the Court of Appeal affirmed the judgment. Here the act itself was equivocal, but the intention was explained by the defendant's letter of 31st July, which it was of course for the Court to construe.

(d.) Acceptance may be inferred from the fact of the buyer dealing or attempting to deal with the property in the goods, or with the documents giving a title or control over the goods.

(d) Dealing with the property of the goods.

This is illustrated by the following cases:—

*Chaplin v. Rogers* (1800, 1 East, 192). Plaintiff had sold to

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defendant a stack of hay. Defendant, without removing it, sold it to a subvendee who, without defendant's leave and against his will, as the latter alleged, took away part of the bulk. The plaintiff had a verdict, and the Court refused to disturb it.

*Blenkinsop v. Clayton* (1817, 7 Taunt. 597). Plaintiff had sold a horse to defendant by verbal contract. Subsequently the latter holding himself out as owner of the horse offered to sell him to a third party. The plaintiff had a verdict, and the Court ruled that there was evidence of acceptance, but ordered a new trial because the question had not been left to a jury whether or not there had been actual receipt.

*Morton v.  
Tibbett.*

*Morton v. Tibbett* (1850, 15 Q. B. 428) is an important case, in which Lord Campbell delivered the judgment of the Queen's Bench. To avoid misconception of what was actually decided it is necessary to state the facts at some length. They were, as reported, as follows:—On the 25th Aug. 1848, at market, in March in Cambridgeshire, plaintiff sold to defendant by sample a quantity of wheat. The defendant said he would send E. (who was a general carrier and lighterman) on the following day to receive the residue of the wheat in a lighter for the purpose of conveying it by inland water transit from March, where it was, to Wisbeach, and the defendant himself took the sample away with him. On the 26th of August, E. received the wheat into his lighter. On the same day the defendant sold the wheat at a profit by the same sample to H. at Wisbeach market. The wheat arrived at Wisbeach in due course on the evening of the 28th, and the defendant altered the destination by sending the wheat to another wharf, there to be delivered to H.<sup>1</sup> On the morning of the 29th the wheat was tendered by E. to H., when the latter refused to take it on the ground that it did not correspond with sample. Up to this time the defendant had not seen the wheat in the bulk, nor had any one examined it on his behalf. Notice of H.'s repudiation of his contract was given to the defendant, and he, on the 30th August, sent a letter to plaintiff repudiating his contract on the same ground. At the trial it was objected for the defendant that there was no

<sup>1</sup> Compare with the report of the case above cited, the allusion to it in *Meredith v. Meigh* (1853, 2 E. & B. 364—371).

evidence of acceptance and receipt to satisfy the requirements of the statute. There was a verdict for the plaintiff. A motion was made pursuant to leave reserved, to enter a non-suit.

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Lord Campbell, who delivered the judgment of the Court, after an elaborate review of the authorities, expressed the conclusion arrived at by the Court as follows :—

“ We are of opinion that, whether or not delivery of goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the Act, without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.

“ We are therefore of opinion in this case that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to E. was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it.”

There has been a good deal of adverse criticism on the language of this judgment by eminent judges in subsequent cases, viz., *Hunt v. Hecht* (1852, 8 Ex. 814, *per* Martin, B., p. 818); *Coombs v. B. & E. Ry. Co.* (1858, 3 H. & N. 510, *per* Bramwell, B., p. 517); *Castle v. Swooner* (1861, 6 H. & N. 828, *per* Crompton, J., p. 832). Indeed, the notion that “ acceptance ” denotes a different act according to the legal consequences which are inferred from it does not seem very intelligible. The decision itself is, however, approved and followed by a decision of the Court of Appeal in *Kibble v. Gough* (38 L. T. 204), where the sale was of a specific quantity of barley on the terms that the bulk should be well dressed and equal to sample. On certain barley being delivered as in pursuance of the contract, the defendant’s foreman had given a receipt for it marked “ not equal to sample,” but it was proved at the trial that the barley was in fact equal to sample. It was decided that there was acceptance within the statute, and judgment was given for plaintiff.

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The conclusion to which I have arrived on a full consideration of the authorities is, that the language of the judgment in *Morton v. Tibbett* is fairly open, by the use of the word "acceptance" in a double meaning, to the adverse criticisms which have been made on it; but that the decision is really based on a principle capable of being expressed in intelligible language. The predicament to which the word "acceptance" in its first sense, is applied in this judgment, would be, I think, more accurately and significantly marked by the phrase "conditional acceptance." It is an acceptance subject to a condition that the acceptance may be recalled if, when the time for examining or testing the goods arrives, they shall be discovered to be not according to contract. The term "conditional acceptance" corresponds with the expressions used by Lord Chelmsford in his judgment in *Couston v. Chapman* (L. R. 2 H. L. Sc. 254), and with the expression "provisional acceptance" used by Denman, C.J., in *Curtis v. Pugh* (11 Q. B. 114), and perhaps Lord Justice Brett's phrase "no absolute acceptance" in *Kibble v. Gough* (38 L. T. 205, comp. *per eundem* in *Heilbut v. Hickson*, L. R. 7 C. P. 438, 456), may be regarded as pointing to the same notion.

Now, on looking at the facts in *Morton v. Tibbett*, it is clear that, assuming the acceptance to have been *conditional* in the sense above-mentioned, the condition under which it might have been recalled never happened; for, after verdict for the plaintiff, it must be assumed that the defendant was not entitled to reject the goods. The same remark applies to the facts in *Kibble v. Gough*, and it will be observed that in Lord Justice Cotton's judgment, reliance is placed on the circumstance that the defendant had *no right to reject the barley*. The receipt in this case seems to me capable of being construed either as a conditional acceptance, which became absolute by its being shown that the barley did in fact correspond to sample; or as an absolute acceptance, reserving a right to claim damages as on a breach of warranty. If a case should arise on a verbal contract where the buyer accepts the goods tendered *conditionally*, and afterwards *rightly* rejects them as not according to contract; I think it still consistent with the decisions, as well as with principle, to say that the Statute of



Frauds would be well pleaded to an action brought by the seller. But, as in such a case the defendant must succeed on the merits, the point can hardly be of practical consequence.

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The cases of *Chaplin v. Rogers*, *Blenkinsop v. Clayton*, and *Morton v. Tibbett* illustrate the proposition that acceptance may be inferred from a dealing with, or attempt on the part of the buyer to deal with, the property in the goods. As further instances, in actions arising not upon the Statute of Frauds but upon the buyer's right to reject the goods as not according to sample, I cite the cases of *Parker v. Palmer* (4 B. & A. 387), and *Chapman v. Morton* (11 M. & W. 534). In both cases the buyer, having offered the goods for sale after opportunity for inspection, was held to have finally accepted them. I shall next cite cases showing that acceptance may be inferred from a mere dealing with the documents.

In *Farina v. Home* (1846), 16 M. & W. 119, the goods were at the time of the agreement in the hands of the wharfinger of the plaintiff (vendor). The plaintiff had endorsed and sent to the defendant a delivery warrant which the latter kept for about ten months. It was left to the jury to say whether there had been a "delivery and acceptance;" and they found for the plaintiff. On motion for a new trial, the judgment of the Court, delivered by Baron Parke, was to the effect that there was sufficient evidence of acceptance but none of "actual receipt" within the statute.

Or with the documents of title to them.

In *Currie v. Anderson* (2 E. & E. 592), the plaintiff, who had shipped goods on the verbal order of the defendant on board a vessel designated by the latter, was allowed to retain a verdict, although the only evidence of the goods having been accepted, or having arrived at their destination, consisted in the fact that the defendant, through an agent of his, kept the bill of lading for more than a year without making any communication to the plaintiff upon the subject of their non-arrival.

Where a larger quantity of goods are sent than ordered, there is no acceptance unless the buyer with the assent of the vendor selects out of the whole quantity the subject of his

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purchase, so as to constitute a new contract as well as an acceptance under it (*Cunliffe v. Harrison*, 6 Ex. 906).

(c) Oral statements of the buyer accompanying an equivocal act.

(c) Oral statements by the buyer to a third party accompanying an act capable of being construed as an act of ownership are admissible as evidence of the intention in a question of acceptance.

In *Baines v. Jevons* (1836, 7 C. & P. 288), before Alderson, B., at *nisi prius*, the question related to the sale of a fire-engine. The buyer had taken a third person to look at it, and said, "I know what I am going to do with it;" and made observations to other persons speaking of it as his own. Baron Alderson in summing up said, "You will consider whether this convinces you that the defendant treated the fire-engine as his own, and dealt with it as such; for if so the plaintiff is entitled to a verdict." A verdict was given for the plaintiff accordingly. The evidence of acceptance in this last case was very slight, and perhaps the case is not much to be relied on. There seems to have been no evidence whatever of actual receipt. I here refer by anticipation to the case of *Marvin v. Wallis* (6 E. & B. 726), a case which as it chiefly turned upon actual receipt will be more fully stated hereafter (see p. 192, *post*).

## II.—*What constitutes actual receipt.*

What constitutes actual receipt.

This will be considered under the following heads according to whether the goods (or part of them) are physically transferred,—

- (a) From the immediate possession of the seller or his servants into that of the buyer or his servants :
- (b) From the immediate possession of the seller or his servants into that of a third party having authority as agent or bailee of the buyer *to receive the goods* : and also the more complex case where the goods are first delivered to a forwarding agent, and then by him delivered to a receiving agent for the buyer, or where the forwarding agent changes his character and becomes the buyer's agent to keep the goods for him.

Or where the goods remain :

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- (c) In the actual possession of a middleman, who from being the bailee of the vendor in respect of the goods, becomes the bailee of the buyer ; or
- (d) In the actual possession of the vendor himself, who by some new arrangement with the buyer becomes his bailee in respect of the goods.

(a) Under this head there can be no difficulty except in the case of bulky goods (*e.g.* timber in the rough) which not being easily susceptible of damage or speedy removal, are apt to be left for a time to take care of themselves. Cases in which a question arose as to the fact of transfer of possession of timber lying in the rough, or merely squared, upon neutral premises, are *Tansley v. Turner* (2 Bing. N. C. 151), and *Cooper v. Bill* (3 H. & C. 722). It was enough that the buyer with the assent of the vendor showed the intention, by any overt act on the spot, to exercise his ownership. The case of a stack of hay in *Chaplin v. Rogers* (1 East, 192, 194) is another instance. The expression *symbolical* delivery has been sometimes applied to such cases, but this expression is inappropriate in regard to moveables, though significant in the history of land tenure. The instance of delivering the key of a warehouse given by Lord Kenyon in *Chaplin v. Rogers*, is one not of symbolical delivery, but of giving the actual possession by the physical means of access to the goods.

(a) Transfer from the immediate possession of the seller to that of the buyer.

It should be borne in mind that as actual receipt is different from acceptance, so refusal to receive or take delivery is a different thing from refusing to accept. Refusal by a person to take delivery of goods tendered to him must be evidenced by some outward act clearly and promptly expressing the intention not to take the goods into his possession or allow them to be brought upon his premises. An instance of refusal to take delivery will be found in the state of facts in *Baldey v. Parker* (3 D. & R. 221) ; and also in that of *Bolton v. Lancashire & Yorkshire Railway Co.* (L. R. 1 C. P. 431).

(b) Actual receipt within the statute is effected by delivery to the warehouseman of the buyer. A warehouseman is a

(b) From the immediate custody of the

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seller or of the forwarding agent, to that of the warehouseman of the buyer.

mercantile agent whose proper function is to receive and keep goods until sold to and taken away by the ultimate purchaser. If the law did not recognise receipt by the warehouseman of the merchant as actual receipt by him, there would in the usual course of business be no actual receipt by the merchant at all.

In *Dodsley v. Varley* (12 Ad. & El. 632), wool, the subject of a verbal contract of sale, had been removed to a warehouse where it was kept along with other wool belonging to the defendant (the buyer), and where it was intended to remain until taken away by the purchaser from him. It was stated in evidence to be the usual course for the wool to remain at this place until paid for; and the Court considered that this circumstance, although not continuing the lien of the vendor, gave him a special interest arising out of his original ownership. Notwithstanding this right of the vendor, it was decided that the warehouse to which the wool had been removed was the defendant's warehouse, and that there was therefore actual receipt within the statute.

Or when the buyer makes the carrier his warehouseman.

It follows as a corollary of the last proposition that *where goods are delivered to a middleman in the first instance in the capacity of a carrier or forwarding agent, any act of the buyer whereby he constitutes the carrier his warehouseman will be equivalent to actual receipt.* The following cases illustrate the circumstances under which the employment of carrier is deemed to be changed into that of warehouseman:—

*Bushel v. Wheeler* (15 Q. B. 443 n.), has been already referred to (p. 173, *supra*). In that case Coleridge, J. (p. 445 n.) says:—"Here goods are ordered by the vendee to be sent to a particular carrier, and in effect, to a particular warehouse, and that is done in a reasonable time. That comes to the same thing as if they had been ordered by the vendee to his own house and sent accordingly. And in the subsequent case of *Meredith v. Meigh* (2 E. & B. 371), Lord Campbell says:—"In *Bushel v. Wheeler* the vendee ordered the goods to be sent by a particular ship; and they were so sent and left lying in the warehouse of the owner of that ship for five months, with the vendee's knowledge. That was evidence that the vendee had constituted the owner of the ship, who had been agent to carry

his agent to keep the goods; and if he had done so he had received them himself."

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In connexion with this subject I shall now mention three cases in which the question was whether the *transitus* had ended so as to put an end to the right of stoppage by the unpaid vendor. The criterion adopted, namely the change of character from carrier to warehouseman is the same as that adopted in *Bushel v. Wheeler*.

In *Leeds v. Wright* (3 Bos. & P. 320), A., a general agent in London for B. & Co. in Paris, having power on their behalf to export goods to such markets as he should think fit, purchased goods in the name of B. & Co. from C. at Manchester, desiring them to be sent to D., a packer in London. After their arrival A. had some of the goods unpacked and exported, and the remainder repacked. While the goods so repacked remained in the house of D., news arrived of the failure of B. & Co. The question arose whether C., as unpaid vendor, could recover the goods as *in transitu*. It was held that they were not *in transitu* but at home, that is to say in effect, that A., acting as general agent for B. & Co., had constituted D. his and their warehouseman for the goods.

Cases relating to  
termination of  
*transitus*.

In *Foster v. Frampton* (1826, 6 B. & C. 107), a tradesman having bought a quantity of sugar, received notice from C., a carrier, of its arrival in Birmingham. He took samples of the sugar and requested C. that it should remain in his warehouse until further directions. The tradesman became bankrupt, and the question was whether the *transitus* was at an end. Bayley, in delivering judgment, cited the cases of *Richardson v. Goss*, Bos. & P. 119, and *Scott v. Pettitt*, 3 Bos. & P. 469, and decided as follows:—"Here the bankrupt on the particular occasion used the warehouse of the carrier as his own, and made it the repository of his goods. I therefore think the *transitus* was at an end as soon as the bankrupt took the samples from the hogsheads and desired that they should remain in the warehouse till further directions."

In *Allan v. Gripper* (2 Cr. & J. 218), goods consigned to P. (the vendee), were conveyed by water and deposited in the carrier's warehouse. It was the usual course for P.'s goods of a like nature to be deposited in that warehouse, and delivered

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out to his customers as they were wanted. *Bayley, J.*, gave judgment as follows:—"If the goods were to remain at the warehouse until some new destination was given them by P., the *transitus* in question must be considered at an end. There are many cases which decide that if you send goods to be delivered at a warehouse, there to abide the orders of the vendee, when they arrive at such warehouse the *transitus* is at an end, and the right of stoppage *in transitu* is consequently gone."

Where there is a *transitus* there is no actual receipt until the *transitus* is ended.

Upon the general tenor of the cases I arrive at the conclusion that where goods, the subject of a verbal contract of sale, are placed in transit on the way to the purchaser, there is no *actual receipt* within the statute until the *transitus* is at an end. The species of facts which have been held to end the *transitus* will be further considered hereafter upon the subject of stoppage *in transitu*.

Contrary view adopted by Mr. Benjamin.

I must admit that the contrary view is adopted by Mr. Benjamin, who says (p. 135):—"It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is in contemplation of law the bailee of the person to whom, not by whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose."

This view criticised.

It is indeed undoubted that *under a contract of sale* it is presumed, unless otherwise expressed, that as soon as the goods are consigned to the buyer in the hands of the carrier, the carrier is in contemplation of law the bailee of the person to whom, not by whom the goods are sent, and the consignee is the person to sue the carrier in case of loss (*Dawes v. Peck*, 8 T. R. 330; *Dunlop v. Lambert*, 6 Cl. & Fin. 600, 620). But all this presupposes a contract, and the case is otherwise where there is no contract (*Coombs v. B. & E. Ry. Co.*, 3 H. & N. 510; *Coats v. Chaplin*, 3 Q. B. 483). It is also undoubted that when goods, the subject of a contract of sale, are delivered to a carrier, the seller, under the old system of strict pleading, was entitled to maintain his action for *goods sold and delivered* (*Dutton v.*

*Solomonson*, 3 B. & P. 582). And such delivery by construction of law transfers the possession to the buyer, so that (subject only to the possibility of a reversion of both property and possession in the seller by stoppage *in transitu*) the seller's rights are at an end (*Walley v. Montgomery*, 3 East, 585). But it does not follow, nor do I find in any of the numerous authorities cited by Mr. Benjamin, any direct authority for the proposition that delivery to the carrier constitutes *actual receipt* by the buyer within the statute. There is indeed a *dictum* of Lord Campbell in *Hart v. Bush* (E. B. & E. 498), who says:—"I think that where there is a verbal contract and an order to deliver to a particular carrier, a delivery to that carrier does satisfy the Statute." This appears to have been in answer to his own question asked in the course of the argument (as reported in the *Law Journal*, 27 L. J. Q. B. 272):—"How can you say that the defendant actually received the brandy when it was at the bottom of the sea?" And in *Smith v. Hudson* (6 B. & S. 431), there are passages in the judgment of Mr. Justice Blackburn (p. 448) which imply that he thought the receipt of the carrier to be actual receipt within the Statute. In that case, however, the question upon the Statute of Frauds was argued on the assumption (which was manifestly true) that the railway company held the goods as warehousemen of the buyer.

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The view which I have adopted is, I think, supported by the general tenor of the judgments in *Meredith v. Meigh* (2 E. & B. 364), though the questions of acceptance and actual receipt are there not clearly distinguished. The same remark to some extent applies to the judgments in *Coombs v. B. & E. Ry. Co.* (3 H. & N. 510); but those of Pollock, C.B. (p. 515), and Martin, B. (p. 516) are particularly directed to *actual receipt*. In the case of *Morton v. Tibbett*, already commented on (p. 176, *supra*), Lord Campbell (15 Q. B. p. 439) lays stress on the circumstance that the vendee not only resold the wheat, but altered its destination by sending it to another wharf. This he argued to be evidence of acceptance and receipt, and though not expressly stated, it may be inferred that the *altering the destination* (which would have put an end to any question of stoppage *in transitu*) was considered material in regard to the actual

The view taken  
in this work  
supported by  
authority.

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receipt; as the resale was in regard to the acceptance. The discussion in *Currie v. Anderson* (2 E. & B. 592) shows that there is no such settled rule as that stated by Mr. Benjamin. For as in that case the goods were delivered to a carrier selected by the buyer, the question of actual receipt would not have been arguable. There is a *dictum* of Lord Denman, C.J., in *Bushel v. Wheeler* (15 Q. B. 445 n.):—"I do not think the mere taking by the carrier is a receipt by the vendee." I think it also not inappropriate to observe the meaning in which the cognate expression "*actual delivery*" has been employed by judges. In *Snee v. Prescott* (1 Atk. 249), Lord Hardwicke applies the phrase "*actual delivery*" to mark the stage where the transit ends. And this decision is referred to by the judges of the King's Bench in *Ellis v. Hunt* (3 T. R. 464, 468, 469); and the phrase "*actual delivery*" used as the test of the right of stoppage *in transitu* being at an end. The criterion of *actual delivery* was here considered to be satisfied by the buyer's assignee in bankruptcy having put his mark on the goods arrived in the hands of the carrier at the inn where his journey ended.

And on principle.

If the point were to be considered independently of authority, I should think the express intention of the statute, by the use of the word "*actual*," was to distinguish the kind of receipt meant from the constructive possession of the consignee by the carrier. It is indeed in some sense by a construction that the merchant is said to receive goods by his warehouseman; but such receipt is in a fair mercantile sense *actual receipt* by the merchant, being that which ordinarily takes place in the course of business.

(c) Where the warehouseman of the seller attorns so as to become the warehouseman of the buyer.

(c) Where the goods, notwithstanding the engagement to sell, remain in the custody of a middleman, who at the time of sale held them as warehouseman for the vendor, the question of actual receipt within the statute depends upon the consent of the three parties to the effect that the middleman shall thenceforth hold them as warehouseman for the buyer. Such joint consent constitutes an equivalent to delivery for, I think, every legal purpose. The most satisfactory evidence of it is an order by the vendor and a note by the middleman



acknowledging the order, and stating that the goods have been transferred in his books to the vendee. A similar note transferring the goods to a sub-vendee would be good by way of estoppel against the warehouseman (*Hawes v. Watson*, 3 B. & C. 540), and if covered by the authority of the vendor's order would, in every respect, complete the delivery.

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But the mere acceptance and receipt of a delivery order not lodged with the warehouseman is not enough to bind the bargain (*Bentall v. Burn*, 3 B. & C. 423; *Farina v. Home*, 16 M. & W. 119, already cited p. 179, *supra*). In the latter case the consignee of the foreign vendor had obtained from the warehouseman a "warrant" making a certain case of goods deliverable to him or his assignee by indorsement on payment of rent and charges. The effect of this is clearly described by Parke, B. (16 M. & W. p. 123) as follows:—"The warrant is no more than an engagement by the wharfinger to deliver to the consignee or anyone he may appoint; and the wharfinger holds the goods as the agent for the consignee (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only there is a constructive delivery to him. In the meantime the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee."

Where, however, there is a *complete subsale* by a vendee who has been furnished with the vendor with *indicia* of a power of selling the goods, there seems to be a complete legal equivalent to delivery as between the vendor and first vendee. In *Green v. Haythorne* (1 Starkie, 447) the vendor had furnished the vendee with an invoice and samples of the goods to enable him to put them upon the market, and the latter sold to a sub-vendee an ascertained and specific parcel of the goods. It was held by Lord Ellenborough that immediately upon the subsale the warehouse where the goods were became the warehouse of the sub-vendee, and the vendor's rights over the goods were gone.

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(d) Goods remaining in possession of seller, who by a new arrangement becomes the bailee of the buyer in respect of them.

(d) Where the goods remain in the possession of the vendor himself, the question is whether or not there is sufficient evidence of a new arrangement whereby the vendor ceases to hold the goods as vendor relinquishing his rights as such, and commences to hold them in another character, namely as the bailee of the buyer.

The conflict of authority presented by the cases upon this point arises from the various species of facts which the Courts have at different times thought sufficient evidence of any such new arrangement having been made. The principle to be deduced from the cases appears to be this:—

*The evidence of such arrangement as to constitute actual receipt by the buyer (the goods remaining in vendor's possession) must consist either of unequivocal facts leading to the inference that both parties treated the goods as delivered, the vendor having parted with his rights as such, and the vendee dealing with them as at home; or there must be evidence of an express agreement whereby the goods are to remain with the vendor as the bailee of the purchaser.*

The authorities by way of illustration are here given in order of time.

*Chaplin v. Rogers* (1800, 1 East, 192), the case of the haystack before referred to (p. 175, *ante*). The leading facts have already been mentioned. The argument of counsel for the defendant is instructive as showing that it was felt necessary on his part to make out that the possession was treated by both parties as the possession of the defendant (*the vendee*).

In the cases of *Anderson v. Scott* (at *nisi prius*, 1806, 1 Camp. 235), and of *Hodgson v. Le Bret* (1808, 1 Camp. 233), Lord Ellenborough held that the mere marking of the goods by the vendee took the case out of the statute, an opinion which has been clearly overruled by the later authorities of *Baldey v. Parker* (2 B. & C. 37), and *Bell v. Bament* (9 M. & W. 36). In *Hurry v. Mangles* (1811, 1 Camp. 452), Lord Ellenborough held the acceptance of warehouse rent by the seller from the buyer conclusive to show an executed delivery, putting an end to the vendor's rights. This decision was, in the subsequent case of *Miles v. Gorton* (2 Cr. & M. 504, 513), attributed to the circumstance that the rights of a sub-vendee intervened; but

that does not appear from the report in Campbell to have entered into the *ratio decidendi*.

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*Elmore v. Stone* (Common Pleas, 1808, 1 Taunt. 458) must, notwithstanding subsequent doubts, be treated as a leading case. The plaintiff, who kept a livery stable and dealt in horses, had asked 180 guineas for the horses in question. The defendant after offering a less price, which was rejected, sent word that the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him. The plaintiff upon this removed them out of his sale stable into another stable. It was objected for the defendant that there was no such delivery as to satisfy the statute. The jury found a verdict for the plaintiff, and the objection was afterwards argued before the Court of Common Pleas. The judgment of the Court, delivered by Mansfield, C.J., was to the effect that the plaintiff by accepting the order that the horses were to stand at livery possessed them not as owner, but as livery stable keeper, and that he had parted with his lien. The verdict was accordingly sustained.

The next case is *Blenkinsop v. Clayton* (1873, 7 Taunt. 597, see p. 176, *ante*). There seems in that case, as Mr. Blackburn observes in his book on Sale (p. 33), to have been no evidence whatever of actual receipt, but the Court of Common Pleas thought it ought to have been left to the jury to say whether there had been any delivery or not.

After the decision of *Blenkinsop v. Clayton*, the current of authority (as Mr. Blackburn further observes) set the other way.

In *Howe v. Palmer* (1820, 3 B. & A. 321), after a verbal sale of tares by plaintiff to defendant, the latter requested that they might remain on the plaintiff's premises until the time for sowing, which was agreed to. Plaintiff afterwards measured out and set apart a quantity corresponding to the order, and gave instructions to his servants that they should be delivered to defendant when he should call for them. Plaintiff had a verdict with leave to defendant to move to enter a *nonsuit*. Judgments were delivered, in the Queen's Bench, by Abbott, C.J., Bayley, Holroyd, and Best, JJ., to the effect that there was neither acceptance nor actual receipt within the statute.

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Abbott, Bayley, and Best chiefly confined themselves to showing that there was no acceptance. Holroyd gave judgment on both grounds. Bayley expressed a doubt whether *Elmore v. Stone* was well decided.

*Tempest v. Fitzgerald* (also in the King's Bench, 1820, 3 B. & A. 680) arose out of a verbal engagement to sell a horse in August. The defendant had asked the plaintiff to keep the horse for him until he should return about the 22d September. He returned about the 20th September, rode the horse, had it rubbed down by his servant, and then requested the plaintiff to keep it for another week. Notwithstanding a special verdict to the effect that the defendant's riding the horse was an act of ownership, the Court decided that he had no such receipt and control as owner as to take the case out of the statute.

*Carter v. Toussaint* (King's Bench, 1822, 5 B. & A. 855, and 1 D. & R. 515)<sup>1</sup> is cited by Mr. Blackburn as a case in which the facts approached very nearly to those in *Elmore v. Stone*. The plaintiff had verbally sold a horse to defendant, and it was agreed that the horse should remain with the vendors for twenty days without charge to the vendee. At the expiration of that time the horse was, by the direction of the vendee, sent to grass and, also by his desire, entered in the park-keeper's books in the name of the vendor. It was held that there was no actual receipt within the statute. The test was again applied, whether the vendor had parted with his rights, and it was held that he had not. The distinction between this case and *Elmore v. Stone* appears to be that in the earlier case there was evidence of an express agreement that the plaintiff should keep the horse at livery. This is not adverted to by Mr. Blackburn in his book on Sale, but the cases of *Beaumont v. Brengeri*, 5 C. B. 301, and *Marvin v. Wallis*, 6 E. & B. 726, decided since the publication of that work, give some importance to it.

The case of *Baldey v. Parker* (1823, 2 B. & C. 37; 3 D. & R. 221) has been already alluded to. The defendant had ordered a number of goods in a linendraper's shop to the value,

<sup>1</sup> The latter seems the more full report, and points out most clearly the distinction between the case and *Elmore v. Stone*.

in all, of more than £10. Some of them were actually marked, and it appears that all were specifically selected by him, so that the fact of acceptance was clear, according to the more recent case of *Cusack v. Robinson* (1 B. & S. 299). The goods were sent to the house of the defendant, and on his refusal to pay for them because sufficient discount was not allowed, were taken back again. They were afterwards sent again to the defendant's house and tendered to his servant, who refused to take delivery. It was held that the statute was not satisfied, Bayley, J., observing, "The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the possession of the seller." This case and the subsequent cases of *Smith v. Surnam* (1829, 9 B. & C. 561), and *Bill v. Bament* (1841, 9 M. & W. 37), overruling the authority of Lord Ellenborough in the cases of *Anderson v. Scott* and *Hodgson v. Le Bret*, previously cited (p. 188, *supra*), put an end to the notion that mere marking of the goods by the purchaser can be taken as actual receipt within the statute, and show further that no act done by the purchaser upon the goods *in contemplation of their subsequent removal from the vendor's premises to his own* can be construed as actual receipt by him.

If authority had stopped here, there would have been a great deal to be said in favour of the proposition that the new arrangement which is to constitute actual receipt by the buyer, of goods remaining in the actual possession of the vendor, can only be inferred from acts of an unequivocal nature. The most recent cases, however, show a return in the current of authority; and not only do they favour a more easy construction of the facts to infer actual receipt, but they also show that such receipt may be inferred from mere parol evidence of a verbal agreement, whereby the vendor parts with his right as such and becomes the bailee of the purchaser.

In *Beaumont v. Brengeri* (1847, 5 C. B. 301), the Judges of the Common Pleas went to the extreme of refinement in construing the facts as evidence of actual receipt. The facts in evidence were as follows:—In the early part of November, 1846, the defendant called at the shop of the plaintiff, a coach-maker in London, and there saw a carriage which he agreed to buy for the sum of £70, at the same time giving instructions to

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the plaintiff to make some alterations. This having been done, the defendant again saw and approved of the carriage, and requested that it might remain in the plaintiff's back shop until he was ready to ship it for Denmark; at the same time observing that he would make use of it a few times, in order that it might pass the Custom-house for second-hand. Accordingly, on Saturday, the 14th November, the defendant requested the plaintiff to hire a horse and man and to send them to his house the following day, as he wished to drive round the park. This was done, the defendant paying 13s. for the hire of the horse and man, and the defendant, after using the carriage a few hours, returned it to the plaintiff, and afterwards refused to accept or pay for it. The Court held there was evidence of actual receipt as well as of acceptance within the statute. "In cases of this sort," said Coltman, J., "the question will be, whether the vendor held the subject-matter of the sale as owner, or merely as warehousekeeper for the vendee. Looking at the evidence in this case, it appears to me that there is enough to show an agreement between the parties that the plaintiff should hold the carriage as a warehousekeeper.

In *Marvin v. Wallis* (decided in the Queen's Bench in 1856, 6 E. & B. 726), the facts, as given in evidence for the plaintiff (vendor), were that there was a complete bargain for sale of a horse at a price above £10 for immediate delivery; that after the bargain was complete the plaintiff asked the defendant to lend him the horse for a few days until he got another, to which the defendant agreed, if the plaintiff would take care of it; that the plaintiff in consequence kept the horse from that time not as vendor, but as borrower. The jury had found that the contract was complete before the permission to keep the horse was given to the plaintiff, and that the horse was lent by the defendant as owner. The Court held, on the authority of *Elmore v. Stone*, that this amounted to a verdict for the plaintiff, and that there was evidence of actual receipt, within the statute, to support such a verdict.

*Castle v. Sworder* (1861, 6 H. & N. 828), was a case decided by the Exchequer Chamber, in which that Court, consisting of Cockburn, C.J., and Crompton, Williams, Byles and Keating, JJ., were unanimous in reversing a decision (also unanimous) of the

Court of Exchequer, consisting of Barons Martin, Channell and Bramwell, and held that there was evidence to go to the jury of the vendor having become bailee for the purchaser. The facts appearing at the trial were these:—In February, 1857, the traveller of the plaintiffs, who were spirit merchants at Bristol, received a verbal order from the defendant, an inn-keeper, for two puncheons of rum and one of brandy on the terms (as it was stated) that they were to remain in bond in the plaintiffs' warehouse till defendant wanted them, for six months without payment of rent and after that period subject to warehouse charges. The defendant was to have six months' credit. The plaintiff sent an invoice specifying by their marks two particular puncheons of rum and a hogshead of brandy as sold to defendant for £80 2s. 2d., and adding the words, "free for six months." The plaintiffs had a warehouse in which they were in the habit of keeping the goods of other persons as well as their own. The spirits in question lay in a bonded cellar forming part of that warehouse, and their delivery out was therefore, of course, subject to the control of the officers of customs. As soon as the spirits in question were sold, the plaintiffs entered the transfer in their books, specifying the particular casks as sold to the defendant. After that entry, it appeared, the plaintiffs had no power of getting the goods out.<sup>1</sup> On the plaintiffs' traveller calling with the account after the credit was expired, the defendant asked whether the plaintiffs would take the goods back or sell them for him. He afterwards wrote to the plaintiffs asking what price they were willing to give for the rum and brandy. The Court below had decided that although there was evidence of acceptance there was none of actual receipt to satisfy the statute. In giving judgment in the Exchequer Chamber, Cockburn, C.J., says (6 H. & N. 336):—"I think there was evidence that the possession of the plaintiffs, which had originally been as owners and sellers, had been converted into a possession by them as bailees for the buyer; for as soon as the goods had been specifically appro-

<sup>1</sup> This last point is not mentioned in the report of the case in the lower Court and does not appear to have been brought to

the notice of the judges there. This may perhaps account for the different fate of the case in the Court of Error.

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priated, the defendant, by virtue of his right as purchaser, evidenced by the terms of the invoice, availed himself of his right by having the goods warehoused in the general warehouse of the sellers, and by requesting the sellers to take back the goods, and failing that to resell them for him."

Crompton, J., concurred in this decision, on the ground that the invoice and the entry in the books by the plaintiffs, which put the goods beyond their control, was evidence that they acted as warehousekeepers, and the correspondence and the fact of the defendant keeping the invoice afforded evidence that he acquiesced in the plaintiffs so acting. Williams, Byles and Keating, JJ., concurred in the decision but without expressly stating their reasons.

Where there has been a sub-sale, with the privity of the original vendor, the abandonment by the latter of his lien in favour of the sub-vendee will be presumed more easily than it would have been in regard to the first vendee. Thus in *Miles v. Gorton* (2 C. & M. 504, 513), Bayley, B., referring to *Hurry v. Mangles*, intimates that the acceptance of rent by the vendors from the sub-vendee was, in effect, a delivery to him putting an end to the lien. In *Stoveld v. Hughes* (14 East, 316), where timber on the vendor's wharf was sold and then resold, and the original vendor being informed of the sub-sale said, "very well," and allowed the agent of the sub-vendee to mark the timber with his principal's name, the lien was held to be at an end. And in *Pearson v. Dawson* (E. B. & E. 448), the vendor having recognised the purchaser under a sub-sale by placing on the file a delivery order which the sub-vendee had received from the original vendee, and by from time to time delivering to him portions of the goods, was held to have abandoned his lien over the goods which remained in his hands not actually delivered. Under circumstances such as occurred in these cases, it would doubtless be held that there was actual receipt under the statute.

Where the goods sold are already in the possession of the buyer as

Where at the time of the sale the goods sold are in the possession of the buyer as bailee of the seller, the acceptance and actual receipt to satisfy the statute are identical, or perhaps it



would be more correct to say that, the goods being in the possession of the vendee, the condition of actual receipt is already fulfilled, and the only question under the statute is whether there has been acceptance. The question then is simply one of intention:—whether the purchaser has taken to them as his own (*Edan v. Dudfield*, 1 Q. B. 302, *supra*, p. 172).

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bailee of the  
seller, the  
question of  
actual receipt  
does not arise.

(B.) *Earnest or part payment.*

"OR GIVE SOMETHING IN EARNEST TO BIND THE BARGAIN, OR IN PART PAYMENT." Little controversy has occurred upon this clause of the statute. In *Blenkinsop v. Clayton*, 7 Taunt. 97, it was held that the buyer drawing a shilling across the vendor's hand and then putting it into his own pocket was not "giving something in earnest," although it was stated in evidence that this was called "striking a bargain" in the part of the country where the transaction occurred. In *Walker v. Nussey* 16 M. & W. 302, it was decided that you cannot construe as part payment under the contract, a term of the contract itself to allow a set-off against part of the price.

Earnest or part  
payment.

Mr. Benjamin in his book on Sale (2nd Ed., p. 146), cites cases under the Statute of Limitations and under the Bankruptcy Acts, from which he deduces the inference, which seems correct, that "part payment" need not be money but may be anything of value which by mutual agreement is given by the buyer and accepted by the seller *on account* or *in part satisfaction* of the price (*Hooper v. Stevens*, 4 Ad. & El. 71; *Blair v. Ormond*, 17 Q. B. 423). It has also been held under the Statute of Limitations that payment may be well made by settlement of accounts or by an agreement to set off, although no money actually passes (*Amos v. Smith*, 1 H. & C. 238). An extreme case of *constructive* payment is *Maber v. Maber* (L. R. 1 Ex. 153). The period of limitation for payment of a debt had expired, a calculation was made of the interest, and the amount having been ascertained the debtor then and there offered to pay it, putting his hand in his pocket as if to take out the money. The creditor then said, "Stop a bit," wrote out a receipt for the money and handed it to the debtor, saying, "I shall make you a present of this money." No money actually passed. This transaction was held (by Martin, Channell,

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and Pigott, BB.; Bramwell, B., dissenting) to be a payment of the interest so as to take the debt out of the Statute of Limitations.

(C.) *Note or Memorandum in writing.*

Note or  
memorandum.

"OR THAT SOME NOTE OR MEMORANDUM IN WRITING OF THE SAID BARGAIN BE MADE AND SIGNED BY THE PARTIES TO BE CHARGED BY SUCH A CONTRACT OR THEIR AGENTS THERE-UNTO LAWFULLY AUTHORIZED."

Common law  
principles as to  
evidence of  
intention when  
committed to  
writing.

To avoid confusion, it is necessary here to refer to a principle of the common law, entirely distinct from and independent of this clause of the statute. This principle which pervades the law of evidence may be stated as follows:—

*Where a legal relation rests upon an intention conveyed by writing, the writing is the only primary and is conclusive evidence of the intention.*

The principle as applied to the law of contracts, may be expressed thus:—*When the terms of a contract or any of them are embodied in writing with the assent of the parties, for the purpose of finally settling what those terms are to be, or if the contract is made with reference to terms already embodied in writing, the writing is the only primary evidence of those terms, and is conclusive as to what they were.*

It is sometimes convenient as a shorthand way of expressing this principle, to designate the writing which is so employed as the medium of consent,—“the contract;” and using the word in this sense the principle has been tautologically expressed thus:—*Parol evidence cannot be tendered for the purpose of altering the terms of a written contract.*” *Per Lord Justice James in Hill v. Wilson (L. R. 8 Ch. 901).*<sup>1</sup>

<sup>1</sup> An apparent exception is the case of partnership articles:—“The transactions of the partners are always to be looked to, in order that you may determine between them, even against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability amounting almost to demonstration.” (*Geddes*

*v. Wallace*, 2 Bli. 270, per Lord Chancellor Eldon, p. 297). This is no real exception to the rule above stated, for the evidence is allowed not to contradict the articles as expressing the intention of the parties at the time of executing them, but to show that the original intention has become changed or modified by mutual consent evidenced by conduct.

To bring a case within the principle, the intention that the writing should embody the terms of an agreement is an essential element. And, however difficult it may be to prove that a document purporting to be an agreement and to be signed by parties as such, was not really made and signed with that intention, yet if this is clearly established by parol evidence, the real intention will prevail against the apparent one (*Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202; *Rogers v. Hadley*, 2 H. & C. 227; *Clever v. Kirkman*, 24 W. R. 159; *Hussey v. Horne Payne*, 4 App. Ca. 311, 320, 321). This is clearly put by Mr. Baron Bramwell in his judgment in *Wake v. Harrop*, "When the parties have recorded the contract the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract." It is to be observed that most of the judges both in the Court of the Exchequer and the Exchequer Chamber in this case rested their decision on the hardly intelligible ground that although the contract was binding *at law* on the agent who signed it, he had an *equitable* defence on the ground of *mistake*. It is difficult to see what is the equitable jurisdiction which the learned judges understood themselves to be exercising: as it is well pointed out by V.-C. James in *Mackenzie v. Coulson* (L. R. 8 Eq. 368, 375), that Courts of Equity do not rectify contracts. The mistake, which was clearly proved in the case of *Wake v. Harrop*, went to this, that the defendant who was in the action charged as a party to the contract had never been intended to be a party at all, and it is submitted that the judgment of Baron Bramwell, which was followed in the Exchequer Chamber by Mr. Justice Willes, puts the decision on the only satisfactory ground.

I have said that the principle of the common law immediately above stated is to be distinguished from the enactment as to the note or memorandum in writing contained in the Statute of Frauds. The distinction, as well as the relation between the principles, is very accurately stated in *Blackburn on Sale*. After explaining the common law principle of evidence in regard to contracts; the learned author proceeds as follows (p. 45):—

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"But if the terms are put in writing, but not as a matter of compact between the parties to settle what the terms are, the case is different. If the writing is made by a bystander without any authority from the parties, the writing is not evidence at all, though it may be used to refresh the memory of him who made it. If one of the parties only authorised the making of the memorandum, or afterwards admitted its accuracy, it is evidence against him as an admission, but not in law either indispensably necessary for the proof of the contract, or conclusively binding upon him against whom it is evidence.

"Now the Statute of Frauds leaves this quite as it was before. If the contract, or part of it, is in writing, the writing must be proved, though there has been a part payment or a part acceptance and receipt; and if the writing is a part of the agreement it must be proved though it would not satisfy the third exception, either because it is not signed, or for any other reason. And the writing when proved, has just as much effect in settling conclusively what the terms of the bargain are, as it would have if the Statute of Frauds had never been passed. The proof of the writing is as indispensable and as conclusive in a contract for the sale of goods for more than £10, as in one for the sale of goods for less than £10, and not more so. And when a party has signed a memorandum of the terms of the contract, which is not more than an admission of the terms of the contract, the other party is not forced to use this evidence, if he can in any other way satisfy the exceptions in the statute, and if he does use it the memorandum does not bind the other party more than a similar admission would have done if the price had been less than £10. It is strong evidence of what the agreement is, but it is not the agreement itself. It may make the contract good, because it is in writing and signed, and for the same reason it is capable of clear and undeniable proof, but its effect in settling the terms of the contract is no greater than that of a similar admission by word of mouth."

The principle  
of extrinsic  
evidence.

Before entering in detail upon the questions arising under this clause of the statute I shall advert shortly to another general principle of the law of evidence, which is this:—*Where the law (whether by statute or otherwise) requires anything to*

be expressed in writing, every person calling on a Court of Justice to read and give effect to the writing, has a right to require that the Court shall, by extrinsic evidence, if necessary, place itself in the situation of the person or persons whose meaning was to be thereby expressed, so as to read and interpret the writing from this point of view. In other words, extrinsic evidence is admissible to show what is meant by the writing, but not to show that one thing was written and another meant (Wigram on Extrinsic Evidence, *passim*, and particularly p. 88; *Forlong v. Taylor's Executors*, H. of L. Apl. 3rd, 1838; 3 Shaw and McLean, 210; *Charter v. Charter*, L. R. 7 H. L. 364, 377). This is the principle of extrinsic evidence in its most general form. It would be beyond the scope of the present work to pursue in detail the application of this principle. On this subject I refer to the numerous treatises on the law of evidence, particularly the special treatise of Wigram above referred to. I also refer, in regard to the evidence of usage in particular trades to the notes in the first volume of Smith's Leading Cases collected under the leading case of *Wigglesworth v. Dallison*.

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To return to the Statute of Frauds. The questions now to be considered are,

- I. What is a note or memorandum of the bargain :
- II. What is signature by the parties to be charged :
- III. Who are their agents thereto lawfully authorised.

I. The first question resolves itself into two :—

- 1st. What papers or documents physically distinct may constitute a note or memorandum in writing within the statute, and
- 2ndly. What is construed to be a sufficient note or memorandum of the bargain.

I. What is a note or memorandum of the bargain.

*First*.—If the essential elements of the memorandum are contained in a single paper there can be no difficulty although they have to be collected from different parts of it; *e.g.*—conditions of sale in one part, and a signed agreement in another (*Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Coldham v. Shower*, 3 C. B. 312);—an invoice sent by the seller with a note on the

1. How far may it exist in papers physically distinct.

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No difficulty where there is physical connection between the papers.

back of it by the buyer (*Wilkinson v. Evans*, L. R. 1 C. P. 407). The same is the case, if the essentials are to be collected from two or more papers physically attached or annexed at the time of signature, as in the case of *Sarl v. Bourdillon* (1 C. B. N. S. 188), where the defendant signed an order for goods on the order book of the plaintiffs containing his name on the fly leaf.

Connexion by reference.

*Ridgway v. Wharton.*

Statement of principles deduced from it.

More difficult is the case where two or more papers physically separate contain *ex facie* such mutual reference as to connect them into a single note or memorandum in writing within the statute. This subject was very fully discussed in the case of *Ridgway v. Wharton* (1857) in the House of Lords (6 H. of L. Ca. 238, 257). This was a case upon the 4th section of the statute, but it was distinctly intimated by Lord Cranworth (a very safe authority) that he thought the same principle applied to the 17th section. Looking at the cases by the light of the judgments in *Ridgway v. Wharton*, and applying to this particular case the general principle of extrinsic evidence above stated, the following may be safely stated as a rule of construction:—*Where there are two (or it may be more) writings, one containing the terms and not signed according to the statute, and the other signed but not on the face of it containing the terms, and such writings are capable (having regard to the circumstances under which they were respectively written and signed) of being with legal certainty so construed that the latter refers to the former as a document embodying or further setting forth the terms of the contract; then parol evidence is admissible to prove those circumstances in order to establish this construction; and this construction being established, the documents may be read together as a note or memorandum in writing of the contract.* It is not enough that a reference to the same transaction may be inferred from the terms of the document (*Hinde v. Whitehouse*, 3 A. & E. 355; *Peirce v. Corf*, L. R. 9 Q. B. 210. See also *Stanley v. Dowdeswell*, L. R. 10 C. P. 102).

Illustration from cases relating to probate of wills.

I refer here, by way of illustration, to a class of cases relating to the probate of wills, namely where the Court admits a docu-

ment to Probate as being incorporated by express reference in a will. The principle is the same as that in the case of contracts, namely, that the intention to incorporate must be expressed by the executed document, and the terms of the incorporated document must be consistent with the intention so expressed. The extrinsic evidence is only admissible to put the Court in the position of the person who made the will so as to judge of the meaning of the written language used by him. As some of the more recent cases giving a clue to the rest I refer to *In the goods of Sunderland* (L. R. 1 P. & M. 198); *In the goods of Ascall* (L. R. 1 P. & M. 606); *In the goods of Gill* (L. R. 2 P. & M. 6); *In the goods of Mercer* (L. R. 2 P. & M. 91). In the three first cited cases, the document tendered was admitted; the last it was not.

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In *Naylor v. Goodall* (26 W. R. 162), a case under the 4th section of the statute, a signed memorandum described the property as "The 'Jolly Sailor,' offices, &c., with all the rights and privileges as per plan." There were two plans, both containing the "Jolly Sailor," but which differed from each other. The evidence, by cross-examination of the defendant, was held by V.-C. Malins admissible to show which plan was meant. If there had been only one plan it would doubtless have satisfied the conditions above laid down. The existence of a second plan introduced an ambiguity, which was again removed by the evidence.

Other illustrations.

I refer, also by way of illustration, to the principle laid down by Lord Westbury as to the incorporation of a document in a special contract so as to satisfy the requirements of the clause in the Railway and Canal Traffic Act (17 & 18 Vict. c. 41, s. 7), that such special contract should be signed by the bailor. "In order," he says, "to embody in the letter any other document or memorandum or instrument in writing so as to make it part of a special contract contained in that letter, the letter must first set out the writing referred to or so clearly and definitely refer to the writing that by force of the reference the writing itself becomes part of the instrument it refers to" (see *the letter referring to it, Peek v. N. Staffordshire Rail. Co.*, 10 H. of L. 473, 568).

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Statement of  
rule by  
Blackburn.

The rule of construction (p. 200) above stated is consistent with the principles laid down, in cautious language, by Mr. Blackburn in his book on Sale, published before the case of *Ridgway v. Wharton* (6 H. of L. Ca.). He says (p. 49):—"If the reference (namely, that made by the signed document to something extraneous) is to something verbal, or ultimately to a writing by the medium of something verbal, the common law would take the whole together as showing what the contract is, but as one link of the evidence is not in writing, it will not in general operate as a *memorandum in writing* to take the case out of the statute."

Authorities  
reviewed in  
detail.

In the decision of *Ridgway v. Wharton* (6 H. of L. Ca. pp. 257, 258), Lord Cranworth referred to *Allen v. Bennett* (3 Taunt. 169), and *Dobell v. Hutchinson* (3 Ad. & El. 355). *Allen v. Bennett* was a case involving a different question; namely, whether two notes, both of which were signed, could be connected together as a memorandum. This will be considered presently (p. 205). *Dobell v. Hutchinson* was a case under the 4th section of the Statute of Frauds, and supports the rule of construction above (p. 200) laid down. In *Jackson v. Lowe & Lynam* (1 Bing. 9), a case under the 17th section, the unsigned writing was held to be incorporated by reference, and it must be confessed that the implication of reference was very fine. The buyer wrote to the seller, complaining of the quality of the "corn delivered to me in part performance of my contract with you for 100 sacks good English seconds flour at 45s. per sack." To which the sellers replied that they considered they had performed "their contract" as far as it had gone. It was held that a jury were warranted in drawing the same inference as if the words in the second letter had been, "they have performed the contract mentioned in your notice." A very similar question arose in the case of *Buxton v. Rust* (L. R. 7 Ex. 1, 279). Here there was a memorandum signed by the plaintiff only and handed by him to the defendant on the occasion of the bargain being made. The memorandum contained the terms of a contract for a purchase of a parcel of wool, "the whole to be cleared in twenty-one days." A subsequent letter from the defendant to the plaintiff said: "It is now twenty-eight days



since you and I had a deal for my wool which was for you to have taken all away in twenty-one days . . . therefore I shall consider the deal off as you have not completed your part of the contract." Some of the judges appear to have thought the letter by reference incorporated the memorandum, but it was unnecessary to decide the point, as the case was made clear by a subsequent letter of the defendant to the plaintiff saying, "I beg to enclose a copy of *your letter* of the 11th January, 1871," and then *setting forth the memorandum* which had been signed by the plaintiff. Still finer, perhaps, than in any of the cases above cited is the implication by which a document was held to be referred to in the case of *Long v. Millar* (in the Court of Appeal, 4 C. P. Div. 450), under the 4th section of the Statute of Frauds. There was an agreement in writing for the sale of land at Hammersmith signed by the plaintiff, and a receipt signed by the defendant for the amount of deposit-money on "*the purchase of land at Hammersmith.*" It was held that by these words the receipt sufficiently referred to the document containing the agreement in writing for the purchase.

In *Sanderson v. Jackson* (1800), 2 B. & P. 238, it was considered by Lord Eldon that a letter signed by defendants (vendors) asking for directions as to "what time we shall send a part of your *order*," was sufficiently connected by way of reference with a bill of parcels delivered by the defendant to the plaintiff (vendor). "Although," Lord Eldon said, "it should be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants." It is certainly rather hard to see, in this case, how the connection appeared on the face of the documents themselves, and it is to be observed that the ground of decision which Lord Eldon appears chiefly to have relied on was that the name of the defendants printed on the bill of parcels was itself a signature (see p. 217, *post*).

In further illustration of the rule of construction here under consideration, I refer to *Shortrede v. Cheek* (as to a guarantee,

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1 Ad. & E. 57), *De Beil v. Thomson* (under the 4th section, 3 Beav. 471) and *Gibson v. Holland* (L. R. 1 C. P. 1), where the papers were held sufficiently connected; and the following cases where they were not:—*Hinde v. Whitehouse* (7 East, 558), *Kenworthy v. Scholfield* (2 B. & C. 945), *Boydell v. Drummond* (under the 4th section, 11 East, 142), *Caregan v. Richards* (15 L. T. (N. S.) 252), and *Cave v. Hastings* (under the 3rd section, 7 Q. B. D. 125).

*Johnston v. Dodgson*, 2 M. & W. 653, was a case disposed of on a different ground (see p. 219 *inf.*), but in which Lord Abinger and Baron Parke seem to have differed on the question whether a memorandum and a subsequent letter could be construed together. The memorandum was, "Sold J. D. 27 pockets Playsted 1836, &c.," and the letter dated the same evening and signed by the vendor was, "Please to deliver the 27 pockets Playsted &c." Parke, B., thought the latter only referred to the subject-matter and not to the contract. The question really is, whether it referred to or recognised the memorandum as a document containing the terms of the contract. The words, "the 27 pockets," seem to create a reference by implication almost as strong as in the case of *Sanderson v. Jackson* (see p. 203, *supra*).

*Richards v. Porter* (1827), 6 B. & C. 437, was a case in which Lord Tenterden held the papers (*i.e.* a letter and invoice) not connected by reference, and is thought by Mr. Benjamin inconsistent with some of the cases in which there was held to be connection by reference. The letter signed by the vendee was in these terms:—"The hops I bought of A. on the 23rd January are not yet arrived, nor have I ever heard of them. I received the invoice; the last were longer on the road than they ought to have been, however if they do not arrive in a few days I must get some elsewhere." Lord Tenterden held that the letter and invoice even if read together were imperfect as a memorandum of a contract, inferring that the contract contained some term as to time or manner of delivery which had not been complied with. The decision followed the authority of *Cooper v. Smith* (15 East, 103, see p. 214, *post*), and was itself followed in the later case of *Archer v. Baynes* (5 Ex. 625), where a letter of the defendant referred to an invoice but ex-

pressly stated that there was a term of the contract not contained therein. Possibly Lord Tenterden's construction of the letter in *Richards v. Porter* was over-refined, but construing it as he did, the principle of his decision is perfectly consistent with the general tenor of authority.

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The circumstance that the signed paper is inconsistent with the terms of the contract as stated in the unsigned paper, must not be confounded with another state of circumstances, namely, where the signed paper admits the terms of the contract as stated in the other or recapitulates those terms, but insists *for some reason or other which is insufficient in law* that the contract is at an end. Mr. Blackburn in his book on Sale (p. 66) in the absence of express decision stated that it seemed to him difficult on principle to see how an admission of the terms of the bargain signed for the express purpose of repudiation could be considered a memorandum to make the contract good. The contrary rule was, however, adopted by the Common Pleas in the case of *Bailey v. Sweeting* (9 C. B. (N. S.) 843): where a letter recapitulating the terms of a contract but repudiating it on the ground that the carrier had failed in delivery was held a good memorandum within the statute. The same rule was again applied by the Common Pleas in *Wilkinson v. Evans* (L. R. 1 C. P. 407). In reference to these decisions, Blackburn, J., in *Buxton v. Rust* (L. R. 7 Ex. 282), expressly stated that the point had been settled by the Common Pleas and that he saw no reason to dissent from the rule laid down by them. The same principle is confirmed by the later case of *Leather Cloth Co. v. Hieronymus* (L. R. 10 Q. B. 140).

Letter admitting contract but refusing to perform it.

Hitherto I have considered the case of an unsigned paper incorporated by reference into one signed according to the statute. I now proceed to the case where it is merely required *to supplement an incomplete memorandum which is signed according to the statute with another incomplete memorandum which is also duly signed*. Here it is not necessary that one paper should incorporate the other. It is sufficient that the papers (two or more) are (having regard to surrounding circumstances as before) *capable of being with legal certainty so*

Memorandum consisting of several signed papers.

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*construed as to relate to one and the same transaction, and that when read together they disclose all the essentials of the contract.* The cases which come within the category here adverted to are these:—*Allen v. Bennett*, 3 Taunt. 169; *Western v. Russell*, 3 V. & B. 187 (under sec. 4 of the statute); *Verlander v. Codd*, Turn. & R. 352 (under the 4th section); *Warner v. Willington*, 3 Drew. 523, 25 L. J. (N. S.) Ch. 662 (under the 1st and 4th sections); *Baumann v. Jones*, L. R. 3 Ch. 508 (under the 1st and 4th sections); and *M'Mullen v. Helberg*, 4 L. R. Ir. 95.—*Warner v. Willington* is a good instance of the distinction here insisted on. A memorandum of agreement for a lease was signed by the lessee but the name of the lessor did not appear on any part of the memorandum. Subsequently the lessee wrote to the lessor's attorney and signed a letter in these terms;—"Gentlemen,—I beg to withdraw the memorandum you affect to consider a contract on my part for a lease of the Frog's Hall farm, Takely, Essex, inasmuch as your client Mr. Warner has never to this moment agreed to accept me as the tenant thereof, and the terms of hiring the same have not been arranged. I return you the draft lease which contains clauses I could never assent to." The requirements of the statute were held to be satisfied. Yet it would be impossible to read the letter as admitting a contract in terms of the memorandum. I do not think the contract could have been held to be bound, if the memorandum had not been signed.

Memorandum  
need not be  
between the  
parties.

The note or memorandum required by the statute need not have passed between the parties to the contract. It may consist of a letter signed by the party to be charged written to a third person, and either stating the terms or referring to some paper or papers containing the terms within the principles above mentioned. This was laid down, in regard to agreements under the 4th section of the statute, by Sir E. Sugden (Lord St. Leonards) in his book on Vendors and Purchasers, citing the authority of Lord Hardwicke in *Welford v. Beazley* (3 Atk. 503), and this authority was followed by the Common Pleas in *Gibson v. Holland* (L. R. 1 C. P. 1), under the 17th section. In *Gibson v. Holland* the signed paper relied on was a letter to

the party to be charged to his own agent, in the following terms :—"I only returned home yesterday evening or I should at once have answered your first letter, and sent you a cheque for the mare which you were kind enough to buy for me." The letter of the agent referred to contained the terms of the purchase, and both together were held to constitute a memorandum of the bargain within the statute.

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In *Reuss v. Picksley*, L. R. (1 Ex. 342), the question was considered in regard to an agreement under the 4th section, whether an offer in writing which is afterwards accepted by parol, is a good memorandum within the statute; and this was settled in the affirmative in accordance with the prior decisions in *Warner v. Willington* (3 Drew. 523), *Smith v. Neale* (2 C. B. (N. S.) 67), and *Liverpool Borough Bank v. Eccles* (4 H. & N. 139). It seems free from doubt that the same principle applies to a memorandum of a bargain under the 17th section, and in *Buxton v. Rust*, in the Exchequer Chamber (L. R. 7 Ex. 280), Willes, J., clearly intimates his opinion that *Reuss v. Picksley* settles the point under this section also.

Offer in writing may be accepted by parol so as to bind the offerer.

*Secondly*:—What are the essentials in order that the note or memorandum may be *sufficient* within the statute to bind the bargain.

The principle is that the note or memorandum must contain all essential elements of the bargain. "You cannot call that a memorandum of a bargain which does not contain the terms of it" (*per* Holroyd, J., in *Kenworthy v. Scholfield*, 2 B. & C. 945; and see *Rishton v. Whatmore*, 8 Ch. D. 467). It was decided in *Wain v. Warlters* (A.D. 1804, 5 East, 10), that a writing could not be a memorandum of an agreement within the 4th section of the Statute of Frauds, unless it contained the whole agreement, that is to say, the parties and the consideration and the subject-matter as well as the promise. The decision was a good deal questioned at first, but has long been well established at law (Blackburn on Sale, p. 53).

2. What is construed to be a *sufficient* memorandum (see p. 199, *ante*).

It has been decided under the 4th section that the signature is not of the substance of the contract, nor need the memo-

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randum be made at the time when the consensus is completed; it is sufficient that the signature is put in token of the fact that the document contains the terms of the contract (*Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314). But to make a good memorandum there must be a contract which the document is capable of attesting; and a signed offer which has become abortive by reason of non-acceptance cannot be used as a memorandum of a contract which may have been subsequently entered into in terms identical with those of the offer.

Here must be noted a distinction which has been taken between the 4th and 17th sections of the statute. There is a *dictum* of Baron Alderson in *Marshall v. Lynn* (A.D. 1840, 6 M. & W. 109, 118):—"There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him." To a similar effect are observations of Lord Ellenborough in *Egerton v. Matthews* (A.D. 1805, 6 East, 307), and of Tindal, C.J., in *Laythorp v. Bryant* (2 Bing. N. C. 735, 744), and some support is given to the distinction by the case of *Sarl v. Bourdillon* (1 C. B. (N. S.) 188, 196). I doubt whether the distinction has any practical importance. In a contract of sale the consideration moving the one party is an essential element of the terms by which the other party is bound; and if those terms are required to be in writing, whether by the common law principle or by statute, the consideration necessarily appears on the face of the writing. Perhaps there is this difference, that under the 4th section there must be something on the face of the document to show the intention of contracting, whereas in a memorandum under the 17th section it is enough to express the terms, leaving the intention of contracting to be implied or proved by the surrounding circumstances.

The memorandum must specify.

The note or memorandum must specify:

1st, the parties to the contract in their respective characters of seller and buyer;—

- 2ndly, the subject-matter of the contract,—the thing agreed to be sold ;—
- 3rdly, the price or value to be rendered except where that is left to be implied as aftermentioned ;—
- 4thly, the time or manner of delivery if expressly agreed upon or anything else which is intended by the parties to be an express term of the contract.

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And 1st, the parties. Here I must recall to mind the principle of extrinsic evidence already mentioned (p. 198, *supra*), and further remark that in regard to designation of the parties such evidence is widely resorted to. Indeed the identification of a person, as of every other concrete matter, must require some evidence extrinsic to a writing. And a *designatio personæ* which to indifferent persons might be unintelligible or ambiguous may be quite intelligible and definite, from the point of view of the parties between whom the note or memorandum has passed. The Court will accordingly avail themselves of all evidence which may enable them to look at the note from that point of view. For instance, the name of a firm may be employed to designate one of the parties. It is undoubtedly competent by parol evidence to show who are the persons constituting the firm and that the contract was made with them, and this even where, notwithstanding a change in the firm, the name of the old firm had been put in the note by a broker who was not aware of the change (*Mitchell v. Lapage*, Holt, N. P. C. 253 ; Blackburn on Sale, p. 56). Upon a sale by auction of real estate, it was stated in the particulars that the property was sold by order of the "proprietor." In a question under the 4th section this was held a sufficient designation of the vendor (*Sale v. Lambert*, L. R. 18 Eq. 1 ; *Rossiter v. Miller*, 3 App. Ca. 1124). So "trustee selling under power of sale" was held sufficient (*Cattling v. King*, 5 Ch. D. 560) ; "vendor" simply, is not (*Potter v. Duffield*, L. R. 18 Eq. 4).

1st. The parties.

It is also competent to prove by parol evidence that a person appearing as principal upon the face of the writing forming the contract or memorandum, was really the agent for another :

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and so to enable the real principal to sue or be sued<sup>1</sup> (*Blackburn on Sale*, p. 57; *Trueman v. Loder*, 11 A. & E. 589). But it is not competent for the agent whose name appears on the contract as principal to relieve himself from being sued, on the plea that he was only an agent (*Higgins v. Senior*, 8 M. & W. 834), even when the principal has been disclosed (*Calder v. Dobell*, L. R. 6 C. P. 486, 490).

In *Williams v. Jordan* (26 W. R. 230), an offer in writing to take a lease of a theatre, beginning "Sir—I hereby agree, &c.," was signed by the defendants in the presence of one Watson, who was the plaintiff's agent, and given to Watson to be delivered to his principal; and shortly afterwards the defendant received a letter signed by Watson accepting the offer on behalf of the owner. This was all the correspondence. The Master of the Rolls (Jessel) held the objection under the Statute of Frauds fatal, observing that the first letter was merely an offer signed by the defendants and addressed "Sir" to a person unknown. He obviously drew the inference that "Sir" referred to the principal who was unknown to the defendants at the time of signing. If it could be reasonably inferred that "Sir" meant "Mr. Watson," and that the letter was intended to be addressed to Mr. Watson as agent for an undisclosed principal, there would have been room for arguing that the statute was satisfied. I think it would not. "Sir" could not strictly speaking mean "Mr. Watson," although Mr. Watson might have been addressed under that general title.

Person signing  
as agent  
*prima facie*  
not a party.

If the contract, or note of the contract, is signed by an agent as such, whether the principal is named or not, the agent is *prima facie* not a party to the contract. In that case the agent cannot, as a general rule, sue or be sued upon the contract (*Rayner v. Linthorne*, Ryan & Moody, 325; *Morris v. Cleasby*, 4 M. & S. 566, 575; *Fairlie v. Fenton*, L. R. 5 Ex. 169; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Southwell v. Bowditch*, 1 C. P. D. 374. Compare *Elbinger, &c., v. Claye*, L. R. 8 Q. B. 313, 317). It has been however

<sup>1</sup> It may be observed that the case is different where a person is bound by a deed or agreement under seal. The party to be sued

upon such instrument is the person named in it only. (*Pickering v. James*, House of Lords, Feb. 12, 1875, W. N. p. 26.)



decided that, notwithstanding the contract or memorandum being in this form, evidence is admissible that, by the usage of the particular trade, when a broker purchases without disclosing the name of his principal, he is liable to be looked to as a principal and sued on the contract accordingly. This decision was given by the Exchequer Chamber affirming the judgments of the Queen's Bench in *Humphrey v. Dale* (E. B. & E. 1004). It was argued, 1st. That the evidence was inadmissible as contradicting the terms of the written contract : 2ndly. That there was no note of the contract in writing to satisfy the Statute of Frauds. The contract in question was a parol contract, of which there was a broker's note in this form :—"Sold this day for Messrs. J. & M. to our principal, &c. (Signed) Dale M. & Co., brokers ;" and this note was relied on to satisfy the statute. It was held by a majority that evidence of the custom was admissible as not contradicting the written instrument but explaining its terms, or adding a tacitly implied incident : and that the note, thus explained, was a sufficient memorandum of the contract with the principal to satisfy the Statute of Frauds. This decision has been followed by the Queen's Bench in *Fleet v. Murton* (L. R. 7 Q. B. 126) ; and by the Common Pleas in *Hutchinson v. Tatham* (8 C. P. 482), where evidence of a similar usage in the fruit trade was held admissible to explain the terms of a charter-party signed by an agent expressly in that character.

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If the signature by the agent is not expressly in that character, he makes himself a party, unless a contrary intention clearly appears from other parts of the document. The mere addition to the agent's name, in the body of the document, of the words "(as agents for C. D.)," has been held not to be a sufficient expression of that intention (*Paice v. Walker*, L. R. 5 Ex. 173). The correctness of this decision has been questioned by Lord Justice James in the Court of Appeal (*Gadd v. Houghton*, 1 Ex. D. 357, 359) : but it has been followed in the Exchequer Division by Baron Pollock (*Hough v. Manzanos*, 4 Ex. D. 104).

*Secus* if he does not sign expressly as agent.

There is no doubt however that a clear expression, in the body of the document, of the intention that the person who signs, acts merely as the agent for another, is effectual although

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What if party  
contracts  
nominally as  
agent for a  
non-existent  
person.

no such expression is appended to the signature itself (*Gadd v. Houghton*, 1 Ex. D. 357).

It may here be observed that if a person contracts, nominally as agent for a principal who has no legal existence, *e.g.*, a company in process of formation (*Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, *ibid.*, p. 255); or as agent for a foreign constituent who is not proved to have given express authority to the agent to bind him (*Armstrong v. Stokes*, L. R. 7 Q. B. 598, *per* Blackburn, J., 605), he is bound to make the contract good. This is also practically the effect, if he purports to contract on behalf of an unnamed principal when he has in fact no principal. But the technical ground of his liability in that case is an implied warranty that he has authority on behalf of a principal to make the contract (*Fairlie v. Fenton*, L. R. 5 Ex. 169, *per* Martin, B. 172).

Must be a  
constat of parties  
by express  
terms of  
memorandum.

It will not do to leave the fact who is the buyer, or who the seller, to be gathered merely from extrinsic evidence. There must be a *constat* as to both on the memorandum itself when read with the aid, so far as necessary, of the extrinsic evidence. This is shown by the following cases cited in Blackburn on Sale:—*Champion v. Plummer* (1 N. R. 252); *Allen v. Bennett* (3 Taunt. 169); *Cooper v. Smith* (15 East, 103); and *Jacob v. Kirke* (2 M. & R. 222); and by the more recent case of *Vanderburgh v. Spooner* (L. R. 1 Ex. p. 316). In the last-mentioned case the memorandum relied on was in these terms:—"D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vanderburgh, now lying at the Lyme Cobb, at 1s. per foot. (Signed) D. Spooner." It was held insufficient. It is to be observed that the parol evidence tendered in this case did not tend to throw light on the meaning of the *memorandum*, but it was (unsuccessfully of course) attempted to introduce in aid another paper which was in no way referred to on the face of the memorandum. In a subsequent case (*Newell v. Radford*, L. R. 3 C. P. 52), Willes, J., expressed a doubt whether *Vanderburgh v. Spooner* had been rightly decided, thinking that the memorandum itself expressed by reasonable intendment that Mr. Vanderburgh was the seller, just as a memorandum, "A. agrees to buy B.'s horse" would express that B. was the seller.

The case of *Newell v. Radford* (L. R. 3 C. P. 52), itself affords a good illustration of the application of extrinsic evidence in identifying the party mentioned in the memorandum. The case was this:—On a purchase of flour, J. Williams, a duly authorised agent of the defendant, made the following entry in a book belonging to the plaintiff (Newell):—"Mr. Newell, 32 sacks culasses, at 39s., 280 lbs., to wait orders. June 8. (Signed) J. Williams." In an action for non-delivery of the flour it was proved by parol evidence that Newell was a baker, and the defendant a flour merchant. This was admitted as evidence to explain the memorandum. The Court was thus put in the situation of the parties, and enabled to gather the meaning conveyed *by the writing* to persons so situated, which clearly was that Newell was the buyer and the defendant the seller of the flour.

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The note or memorandum must specify, secondly, the subject-matter of the contract,—the thing to be sold. This is so obvious that scarcely any controversy has arisen upon the point. Here again the scope for the admission of extrinsic evidence is necessarily rather wide. The thing sold is, in the brief notes passing in mercantile transactions, commonly expressed in a sort of short-hand, conveying to persons conversant with the particular trade a sufficient description of the subject, though not intelligible without such knowledge. The Court must, to construe such documents, put itself in the situation of two persons—the writer and the person addressed—and determine from their common point of view what is meant by the writing. This is exemplified by the case of *Macdonald v. Longbottom* (1 E. & E. 977, 987), where a conversation between the parties previous to the contract was held admissible in evidence for the purpose of determining what was meant by the expression "your wool" in the contract itself. On the other hand extrinsic evidence may be used to explain the description of an article in a bought and sold note respectively, (which appears in this case to have been the only evidence of the contract), so as to show a material variance between them, and thus negative the existence of a contract; as where the broker's bought note described the article as "sound and merchantable Riga Rhine hemp" and the sold note as "St. Petersburg clean hemp" (*Thornton v. Kempster*, 5 Taunt. 786).

2ndly. The  
subject-matter  
of the contract.

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3rdly. The price, or consideration, where its amount is an express term of the contract.

The note or memorandum must specify, thirdly, the price or value to be rendered, except where that is left to be implied. If no price be expressly agreed upon, the law will supply the want by inferring that the parties intended to sell and buy at a reasonable price (*Valpy v. Gibson*, 4 C. B. 837, 864); and in such a case it is not, in order to satisfy the statute, necessary that anything as to price should be expressed on the face of the memorandum required by law to bind the bargain (*Hoadley v. M'Laine*, 10 Bing. 482, 4 Moore & Scott, 340; *Ashcroft v. Morris*, 4 Manning & Granger, 450; *Acebal v. Levy*, 10 Bing. 376, 4 Moore & Scott, 217). But where the price was an express term of the contract, it must be specified in the memorandum. If the memorandum is silent as to the point, the only complete contract appearing from the memorandum would be a contract to buy at a *reasonable price*; and if it appear from the parol evidence that the contract was to buy at a price expressly agreed on, *non constat* that this is the same with the reasonable price which the law would imply. The memorandum therefore in such a case does not contain the terms of the bargain, and is insufficient (*Elmore v. Kingscote*, 5 B. & C. 583; *Acebal v. Levy*, 10 Bing. 376). The memorandum equally fails to satisfy the statute if it expresses a price different from that otherwise proved to have been the price expressly agreed on (*Goodman v. Griffiths*, 26 L. J. (N. S.) Ex. 145).

4thly. Any other term or condition which is meant to be an express term of the contract.

The note or memorandum must specify the time or manner of delivery if an express term of the contract, or anything else which has been expressly made a term of the contract.

In *Cooper v. Smith*, 15 East, 103, the plaintiff (vendor), more than a week after the contract, sent an invoice specifying the goods and their price accompanied by a note in these terms;—"Sir, the above was yesterday forwarded by Smith & Son's boat, which I have no doubt will be with you very soon." Next day the defendant wrote, apparently in reply:—"Mr. Cooper, Sir, Your not coming or sending the flour I agreed with you for according to time, I am now provided for, therefore it will not suit me to receive yours, as the price is lower. I have been offered flour a great deal lower this day. I expected yours in the course of a week from the time you were at my house. If

I buy of any man I expect it according to time, or the bargain is void." Except in regard to the question of time, it would be within the authorities to hold that this last letter referred to the invoice and letter of the plaintiff as containing the terms of a contract, and incorporated these documents so as to form with defendant's letter a note or memorandum of the contract. But, the Court further construed the defendant's letter as insisting that it was a term of the contract that the goods should be sent within a week : and as the oral evidence tendered by the plaintiff proved the reverse it was held that the memorandum contradicted the contract as proved by the oral evidence and so was not a good memorandum of the contract within the statute. This decision was followed, as above mentioned, by Lord Tenterden in *Richards v. Porter*, 6 B. & C. 437.

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In *Smith v. Surnam*, 9 B. & C. 561, the letters relied on as a memorandum of the bargain were held insufficient on the ground that *ex facie* they disclosed a dispute as to what the terms of the bargain were. The principle is the same as that which applies in the case of a bought and sold note where these are the only evidence of the contract and there is a variance between them as in *Thornton v. Kempster* (p. 213, *supra*).

## II. What is signature by the parties to be charged.

"It is well settled," says Mr. Blackburn (on Sale, p. 69), "that the only signature required is a signature on behalf of that party who is sought to be charged in the proceeding in which the question rises. The effect of this is, that when the memorandum is signed by one party only, the contract is good or not at the election of the other." In support of this proposition he cites the case of *Allen v. Bennett* (in 1810), in which the Common Pleas treated the point as even then conclusively settled by inveterate practice. "Since the decision of that case," he continues, "thirty-five years more of uniform practice have further confirmed this construction." To which may be added the further period to the present time. This is in effect an exception to the general rule which requires mutuality in a contract (*Mayor, &c., of Kidderminster v. Hardwick*, L. R.

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9 Ex. 13). It seems odd that more controversy has arisen upon this point under the 4th section, although the words of the statute there only require the signature *of the party to be charged*. The point is however under the 4th section settled in the same way as under the 17th, by a long train of authorities, the latest of which are *Laythoarp v. Bryant* (2 Bing. N. C. 735, and 3 Scott, 238), and *Reuss v. Picksley* (L. R. 1 Ex. 342).

Questions under the 4th section have commonly arisen in a Court of Equity, who would not assist a person playing fast and loose (*per* Lord Chancellor Manners in *Lord Ormond v. Anderson*, 2 Ball & Beattie, 871): and also has laid down the principle that unless an offer be accepted and acted on within a reasonable time it must be treated as abandoned (*Williams v. Williams*, 17 Beav. 213, 216). If every contract signed by only one party could be treated as a mere offer, there would be ample authority for the suggestion of Mr. Dart (V. & P. 5th ed. p. 231) that "if only one be bound, he may, it would appear, require the other to signify in writing his assent to or dissent from the contract; and unless this be acceded to he may himself rescind it." This suggestion is probably well founded in the case of a contract requiring the aid of a Court of Equity to enforce it, but there appears no authority for the proposition that a person bound by a one-sided obligation under the 17th section of the Statute of Frauds can obtain any such relief from the hardship under which he is placed. (See Blackburn on Sale, p. 75.)

Signature.

As to what is a signature,—a person is, in the language of English law, said to sign a document when he makes or uses any kind of mark upon it with the intention of thereby giving effect to the document according to its purport; *e.g.*, with the intention, if the document is a will, of completing the testamentary act; if the testatum of a will, of recording the fact of witnessing the testamentary act; if a contract, of becoming bound as a party thereto; if a memorandum, of acknowledging the document as a true record of the matter contained in it.

The notion implied in signature is in fact very clear; the only difficulty in particular cases is to see whether there is legal evidence of the intention. In the case of a will the intention must according to statute (so far as concerns England and Ireland) appear upon the face of the document (15 & 16 Vict.

. 24, s. 1); and the Court of Probate looking at the document and the alleged signature will consider whether they are such that the intention to complete the testamentary act can fairly be inferred. As the most recent cases I refer to *In the Goods of Williams* (L. R. 1 P. & D. 4); *In the Goods of Coombs* (L. R. 1 P. & D. 302); *In the Goods of Huckvale* (L. R. 1 P. & D. 375). With regard to the witnesses to a will the Act (1 Vict. c. 26, s. 9) requires *subscription*, and this is not altered by 15 & 16 Vict. c. 24; but no distinction seems to be drawn for this purpose between *subscription* and signature. The essential is that the act done by the witness must be a completed act intended by him to evidence his attestation of the will (*In the Goods of Eynon*, L. R. 3 P. & D. 92: *In the goods of Maddock*, L. R. 3 P. & D. 169). In the law of Scotland the requirements as to the execution of a will are the same as in any other solemn deed, and as a general rule *subscription* is necessary. Even in the case of a holograph will or deed, *subscription* is, according to Stair (Inst. iv. 42, 6 p. 710), necessary to indicate the completion of the act. And in the case of *Dunlop* (Court of Session Reports, 2nd series, vol. i., p. 912) a holograph writing purporting to be a will commencing with the name of the deceased but not subscribed by him, *being also without date and having blanks for legacies left unfilled*, was held to be not well executed as a will. In the case of *Gillespie*, Dec. 22, 1831 (Court of Session Reports, 1st series, vol. x., p. 176), a distinction is made between *subscription* and *signature*, and it is laid down that a holograph document beginning "I, A. B., &c.," but not otherwise signed, is well executed in terms of a power to be exercised "by a *signed memorandum*."

The intention of signature is easily inferred in the case of a mercantile document. In *Sanderson v. Jackson* (2 B. & P. 238), a bill of parcels with a printed heading, "Bought of Jackson and Hankin, &c.," and the quantity and price of the goods filled up in writing, was delivered by defendants to plaintiff: and this was considered by Lord Eldon to be a memorandum signed by defendants within the Statute of Frauds. In delivering judgment he mentioned that it had been decided that if a man draw up an agreement in his own handwriting, beginning "I, A. B., agree, &c.," and leave a place

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for signature at the bottom but never sign it,<sup>1</sup> it may be considered as a note or memorandum within the statute; "and yet," Lord Eldon continued, "it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed." The case here referred to was *Knight v. Crockford* (1 Esp. N. P. 190). It does not however appear from the report of the case that the appearance of the document was such as to suggest that it was incomplete until subscribed.

Subscription the  
most formal  
mode of  
signature.

I shall recur to the subject of the last paragraph, but must first advert to the usual and ordinary way of signing a document (according to English practice), namely, by *subscribing*, *i.e.*, writing the full name or at least the full surname with the initials of the *prænomen*, at the foot or end of the matter of the document. The name so subscribed by the person bearing it is conclusive evidence of his signature. And if instead of a pen he applies with his own hand a stamp engraved with a fac-simile of his ordinary signature, that is the same to all intents and purposes, as if he had signed it with a pen (*Bennett v. Brumfitt*, L. R. 3 C. P. 28). And if the name is printed with his authority in the usual place of subscription, there seems no doubt that the Statute of Frauds would be satisfied (*ibid.* p. 30). It is also clear that the Statute of Frauds is satisfied if the name of the person to be charged is written in his own handwriting in the commencement of an agreement, whether in the form, "I, A. B., agree, &c." (*Knight v. Crockford*, 1 Esp. N. P. 190; see p. 70, *supra*), or in the third person, "A. B. agrees, &c." (*Bleakley v. Smith*, 11 Sim. 150), or "Mr. A. B., has agreed, &c." (*Propert v. Parkes*, 1 Russ. & My. 625), or in the commencement of a letter in the third person, as "Mr. T. has again seen E. H. Cottage, and offers, &c." (*Morison v. Turnour*, 18 Ves. 175); or "Mr. S. begs to inform, &c." (*Lobb v. Stanley*, 5 Q. B. 574). And if the *principal* in an agreement subscribe it, adding the word "witness" to his name thus (*e.g.*, "witness A. B."),—this addition will not overcome the presumption of intention to give effect to the entire document, and the subscription is a

<sup>1</sup> *sc.*, never subscribe it.



good signature within the Statute of Frauds (*Welford v. Beazley*, 3 Atk. 508, 1 Ves. senr. supplement, p. 6, and *dictum per* Lord Eldon in *Coles v. Trecothick*, 9 Ves. 251). But where a person alleged to be a common agent (an auctioneer's clerk) signed in this way, "Witness, J. N.," the presumption was held to be against the intention to sign as agent (*Gosbell v. Archer*, 2 Ad. & El. 500, 509). Most of the cases immediately above referred to are under the 4th section of the statute, but the principles seem equally to apply to the 17th. It is of no consequence what was the *motive* for signing the document, if only the intention was to attest the document as that which contains the terms of the contract (*Jones v. Victoria Dock Co.*, 2 Q. B. D. 314, 324).

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If the name of the person to be charged is written or printed with his authority in some part of the document other than the usual place of subscription, the question is whether the name is so placed as to *govern* the whole instrument (*Stokes v. Moore*, 1 Cox, 219; *Ogilvie v. Foljambe*, 3 Mer. 62). Thus the name printed (by defendant's authority) in the heading of a bill of parcels has been held sufficient (*Saunderson v. Jackson*, 3 B. & P. 233; *Schneider v. Norris*, 2 Maule & Selwyn, 286). So an entry written by the defendant (Dodgson) in his own book, commencing "Sold John Dodgson," containing the terms of a sale, and signed at his request by the plaintiff's agent but not signed by defendant otherwise than by the entry made by him as above (*Johnson v. Dodgson*, 2 M. & W. 653; *Durell v. Evans*, 1 H. & C. 174). But the name occurring merely in some term of the contract (*e.g.*, that the rent should be paid to the defendant), was held, in a question under the 4th section of the statute, insufficient (*Stokes v. Moore*, 1 Cox, 219; see also *Caton v. Caton*, L. R. 2 H. of L. 127). And it has been held that the signature to a letter does not govern a writing in the same hand enclosed in the same envelope, headed by the word "supplement," and commencing with the words "I had quite omitted to tell you" (*Kronheim v. Johnson*, L. R. 7 Ch. D. 60). The presumption arising from the name being so placed as to "govern the instrument" may be entirely rebutted if it appears on the face of the instrument that it is intended before taking effect to be further signed or subscribed as in the case of an

Other modes of  
signature.

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instrument merely drafted or engraved for execution, and particularly where this appears by a testing clause, *e.g.*, "As witness our hands" not followed by any handwriting (*Hubert v. Treherne*, 3 M. & G. 743). A signature may be well made by initials (*Phillimore v. Berry*, 1 Camp. 513;—and see *dicta* of Lord Westbury in *Caton v. Caton*, L. R. 3 H. of L. 143, and of Blackburn, J., in *Chichester v. Cobb*, 14 L. T. (N. S.) 433):—or by a cross or any other mark duly attested as a signature (*Baker v. Dening*, 8 Ad. & El. 94). A signature may be well made by pencil (*Lucas v. James*, 7 Hare, 410, 419). Here ambiguity may arise from the fact that pencil marks, being easily obliterated, are often used deliberately, *i.e.*, the intention purporting to be expressed by them not being final. In order to show whether they are so used or not in a particular case, evidence of the circumstances under which the pencilling was made may be admitted (*Lucas v. James*, *supra*). *Primâ facie* however the subscription by a person of his name in pencil would be a signature, and so a pencil indorsement has been held a valid indorsement of a promissory note (*Geary v. Physic*, 5 B. & C. 234. As to the use of pencil in testamentary instruments see Williams on Executors, part i. book ii. c. 2, s. 5; and *Muir's Trustees*, Court of Session, Oct. 23, 1869; 8 Macph. 53).

If a person unable to write his name has his hand so guided as to write his name, this has been held equivalent to subscription (*Harrison v. Elvin*, 3 Q. B. (N. S.) 117); and if a person holds the top of a pen in token of his intention while another writes his name this has been held equivalent to signature (*Helshaw v. Langley*, 11 L. J. Ch. 17). In each case the question is one of intention, and evidence of the facts, which is necessarily extrinsic, is admitted to show the intention. In all the cases mentioned in this paragraph there appears to be room for extrinsic evidence; but the Court will doubtless in every case look first at the document itself, and decide as far as possible upon the presumptions which arise on its face, admitting and applying extrinsic evidence only so far as the indications on the face of the document itself are ambiguous. Where the document has been altered, parol evidence is admissible to show what was the condition of the document when

the parties consented that it should be an agreement between them; this being also the moment at which they presumably intended their subscriptions to take effect as signatures (*Stewart v. Eddowes*; *Hudson v. Stewart*, L. R. 9 C. P. 311). If the contract is signed after striking out words which still remain legible, these words cannot be looked at as aiding the construction of the document (*Inglis v. Buttery*, L. R. 3 App. Ca. 552).

If there is no mark on the document capable in the opinion of the Court of indicating the intention of signature, the intention cannot be supplied merely by parol evidence (*Hubert v. Moreau*), 2 C. & P. 528; 12 Moore C. P. 216). Here there was some stroke of the pen relied on as a signature; but the Court appear to have deemed it a mere flourish. A title of courtesy may be employed as a signature; e.g., the commencement of a letter, "The Lord Chancellor presents his compliments," it not being usual, where such a form is employed, to add any other signature. But a letter to R. from his mother beginning "My dear R.," and ending, "Do me the justice to believe me *the most affectionate of mothers*," was held (under the 4th section of the statute) to be not signed (*Selby v. Selby*, 3 Mer. 2). I should have thought this a very good signature.

A telegram sent in the ordinary way is sufficiently signed according to the Statute of Frauds (*Godwin v. Francis*, L. R. 5 C. P. 295).

### III. Who are agents lawfully authorized to sign.

III. Who are agents lawfully authorized to sign.  
Various presumptions of authority.

The constitution and proof of agency depends on the general law of principal and agent, which will be considered hereafter. I shall here note, however, some rules and presumptions specially relating to the authority to sign a memorandum under the statute.

It may be stated as a general rule that when an agent is authorized by his principal to make a contract of sale, he has by implication authority to make the contract effectually by signing a note of it so as to bind the principal within the statute. Blackburn, p. 77.

The authority to sign need not be in writing (*Coles v.*

*Trecothick*, 9 Ves. 250). The authority to sign cannot be delegated. So the authority to record and bind a contract, personally given to a broker's clerk and salesman was held no authority to the broker to sign a note of the contract (*Henderson v. Barnwell*, 1 Y. & J. 387; compare *Coles v. Trecothick*, 9 Ves. 234, and *Blore v. Sutton*, 3 Merivale, 237). So where authority is given to a broker or auctioneer there is no presumption, without some evidence of express sanction by the principal, that the clerk of the broker or auctioneer has authority to sign (*Peirce v. Corf*, L. R. 9 Q. B. 210).

Subsequent ratification (before action is brought) is equivalent to previous authority (*McLean v. Dunn*, 4 Bing. 772); and ratification of a contract which had been entered into by the agent, "whatever it may be" has been held sufficient (*Fitzmaurice v. Bayley*, 6 E. & B. 868).

The plaintiff upon the record cannot avail himself of his own signature as that of an agent to charge the defendant. This point has been decided by the Exchequer Chamber (*Sharman v. Brandt*, L. R. 6 Q. B. 720), settling a point which Mr. Blackburn in his book on Sale (p. 77) mentioned as doubtful upon the previous authorities (*Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmonds*, 5 B. & A. 384; and *Bird v. Boulter*, 4 B. & Ald. 443).

The traveller of a wholesale dealer is presumably *not* authorized by the persons on whom he calls, to sign a contract for them as buyers (*Graham v. Musson*, 5 Bing. N. C. 603; *Graham v. Fretwell*, 3 M. & G. 368); and the presumption is not rebutted by the circumstance of the traveller making out a memorandum of the order in duplicate in the presence of the person charged as buyer (*Murphy v. Boese*, L. R. 10 Ex. 126).

By the judges who decided *Godwin v. Francis* (L. R. 5 C. P. 295, see especially *per* Brett, J., p. 303), it is considered that the operation of sending a telegram resulting in the placing by the receiving clerk of the sender's name on the message delivered, is a signature by the sender as much as if he had signed it with his own hand; so that even though the sender is himself an agent the resulting message is a note signed according to the Statute of Frauds. According to this view the telegraph is deemed to be a self-acting machine set in motion by the sender

and resulting in the transmission of a telegram with his name on it.

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Auctioneers.

It is well settled that a person who bids at an auction offers to buy at the price bid and upon the terms of the conditions of sale; and, by implication, he gives authority to the auctioneer to set down his name upon a memorandum containing the terms of that offer. If the offer becomes a contract, which it does, according to the general usage in auctions, by the fall of the hammer, such a memorandum is a memorandum of the contract, duly signed according to the statute (*Simon v. Motivos*, 1 W. Bl. 559; *Hinde v. Whitehouse*, 7 East, 558, 601; *Emmerson v. Heelis*, 2 Taunt. 38, 48; *White v. Proctor*, 4 Taunt. 209; *Kenworthy v. Scholfield*, 2 B. & C. 945, 948). The auctioneer putting down the name is in some respects equivalent to the bidder putting it down with his own hand, so that if the bidder is only an agent his principal will be bound within the statute (*Emmerson v. Heelis*, 2 Taunt. 38, 48). Yet when the auctioneer was the plaintiff on the record suing on the contract, the objection that he could not use his own signature as that of the other party to the contract was held good (*Farebrother v. Simmons*, 3 B. & Ald. 333). The authority of the auctioneer to sign a contract has been extended to his clerk where there was parol evidence of a special authority to him to sign (*Coles v. Trecothick*, 9 Ves. 250); and in a case where the clerk took down the name of the bidder after calling it aloud *and on receiving a sign of assent* from him (*Bird v. Boulter*, 4 B. & Ad. 443). The bid, it must be remembered, is only an offer, and may be retracted by the person bidding at any time before the fall of the hammer indicating the acceptance of the offer (*Warlow v. Harrison*, 28 L. J. Q. B. 18; 1 E. & E. 295).

The rule that the auctioneer has authority to sign for the purchaser is merely a presumption, which may be rebutted by evidence of a contrary agreement to which the vendor is a party, as, for instance, in a case where an executor selling by auction the goods of a testator had agreed with a legatee that goods bought by the latter at the sale were to be taken in satisfaction *pro tanto* of the legacy at the price bid. The buyer was held not bound by the conditions of the public sale, which

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stipulated for payment of a percentage of the price at the sale and the remainder on delivery (*Bartlett v. Purnell*, 4 Ad. & El. 792).

The auctioneer has no presumed authority on behalf of a bidder to *make a contract*. Without giving a person authority to make a contract it is quite competent to authorize him to reduce into writing and sign a particular contract so as to make it binding within the Statute of Frauds. In *Durell v. Evans* (Ex. Ch., 1 H. & C. 174), the circumstances were held to be evidence of special authority for this purpose. And this is all that the auctioneer is presumed to have authority to do. Accordingly if the auctioneer has signed a note of a contract mis-stating or omitting the conditions of sale, that note does not satisfy the statute so as to bind the bidder (*Blackburn*, p. 78; *Hinde v. Whitehouse*, 7 East, 558).

When the public sale is over, the authority of the auctioneer as such is at an end; and if he afterwards sells the goods at a private sale he has no authority to sign a contract on behalf of the purchaser (*Mews v. Carr*, 1 H. & C. 484).

Brokers  
considered  
hereafter,  
Part VIII.

In the case of contracts made by brokers the questions relating to the binding of the bargain under the Statute of Frauds are so involved with the general law and practice in regard to brokers' contracts, that I have thought best to treat these matters together in the part of this work relating to agency (Part VIII., *post*), to which I accordingly refer.

## PART V.

### THE COMMON INTENTION OF THE PARTIES TO A SALE ; AND HEREIN OF THE EFFECT OF THE SALE IN REGARD TO THE PROPERTY IN THE THING SOLD, AND THE PRIMARY OBLIGATIONS ARISING FROM THE CONTRACT.

THE transfer of the *property* in the thing sold is the primary object of a sale, and it is often necessary to inquire whether the property has been actually transferred, or is only intended to be transferred at some future period. This inquiry becomes important in questions arising out of the accidental destruction of the subject-matter of the sale, and in questions arising out of the insolvency of one of the parties. "If property is destroyed either by pure accident or by the wrongful act of a party who is unable to pay for it, the loss in general falls upon the owner of the property ; and in cases of insolvency, a creditor who has a legal or equitable right to a thing, has the full benefit of it, whilst one whose claim is only against the person of the debtor, can obtain no more than a proportion of the insolvent estate along with the other creditors. In such cases, therefore, it is commonly one of the most important inquiries whether the creditor has any right to some specific property or not" (Blackburn, pp. 1, 2). In the days of strict pleading a question upon the form of pleading frequently arose involving the inquiry whether the property had been transferred ; but except so far as these cases illustrate the rules determining the transfer of property itself, they are now of little significance.

The inquiry as to the point of time when the *property* is transferred, depends on the *intention*, expressed or presumed, of the parties to the sale, and this *intention* and its effect in

#### PART V.

Importance of the inquiry as to the point of time when the property is transferred.

It depends on the intention.

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§ 1.

The various  
questions  
depending on  
the intention.

transferring the *property*, may be appropriately considered together.

I shall consider the questions relating to the intention of the parties to a sale under the following heads:—*First*, Whether or not it is intended that the transfer of property shall take place immediately; or, in other words, whether or not the agreement constitutes a *bargain and sale*, and operates as a conveyance of the thing sold:—*Secondly*, Where the agreement does not immediately operate as a *bargain and sale*, what are the conditions upon which the transfer of property is intended to take place and how are these conditions fulfilled. *Thirdly*, I shall consider other questions of construction and effect going to the essence of the contract. And, *Fourthly*, Questions arising on terms of the contract collateral to its essential objects.

SECTION 1.—WHETHER OR NOT IT IS INTENDED THAT THE  
TRANSFER OF PROPERTY SHALL TAKE PLACE  
IMMEDIATELY.

Bargain and  
sale, in  
English law.

Where the answer to this question is in the affirmative, the transaction is, to use the technical expression of English law, a *bargain and sale*, by which the *property* in the thing sold is by law transferred. In this case, as already remarked (p. 1, *ante*), the transaction is at once a contract and a conveyance. The contract is *executed*, as soon as entered into; or, as it were, executes itself.

Executory  
contract of sale.

Where the intention is that the transfer of *property* is not to take place until after an interval of time, or until the performance of something as a *condition precedent*, the transaction is, in contradistinction to a *bargain and sale* which executes itself, called an *executory contract*.

In what sense  
property trans-  
ferred by the  
intention of the  
contract.

When I speak of the *property* being transferred by the sale, or by the intention of the contract itself, I ought, in order that a perfectly accurate meaning may be attached to the words used, to observe that, speaking generally, the *property* thus transferred is such that, until some further acts are done on either side, the seller is not absolutely divested. So long as he remains in possession the seller has not only the rights of a possessor against all persons other than the owner, but has



even against the owner (the buyer) certain rights springing out of his original ownership, in the nature of a special property modifying the general property residing in the buyer, and capable under certain circumstances of superseding it. It will be further seen that even after parting with the possession and while the goods are *in transitu* to the buyer, the seller has under certain circumstances a right springing out of his original ownership to revest in himself both possession and property; and until the goods are accepted by the buyer there is always a possibility of the transfer of property being avoided by a refusal to accept. In the present section the transfer of property with which I am concerned must be understood as subject to the modifications now referred to, until the final completion of the transaction.

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In order that the transaction may be a *bargain and sale*, it is, from the nature of the case, essential that the goods are specifically ascertained. If I stipulate for the delivery of a certain *quantity* of goods by a *general description*, or even of a certain quantity out of a specified lot or mass of larger quantity belonging to the seller, my right arising out of the contract is not, and until the goods sold are specifically ascertained cannot become, a right of *property* in any goods; nor can there be, in a contract of this kind, any intention that the *property* in any goods shall be *immediately* transferred from the seller to the buyer.

To constitute a bargain and sale, the goods must be specifically ascertained.

That certainty as to the specific subject is, according to English law, essential to the notion of *property* in goods, is shown by Mr. Blackburn by authorities from the Year Books downwards (pp. 122, 123; *Heywood's case*, 2 Coke, 36; *White v. Wilks*, 5 Taunt. 176; *Busk v. Davis*, 2 M. & S. 397; *Wallace v. Breeds*, 13 East, 522; *Austin v. Craven*, 4 Taunt. 644; *Shepley v. Davies*, 5 Taunt. 617; and to these may be added *Garbaron v. Kreeft*, L. R. 10 Ex. 274). The only case necessary to consider as appearing to throw doubt on this proposition, is that of *Whitehouse v. Frost*, decided by the King's Bench in 1810, and reported in 12 East, 614. The case was shortly this :—

*Whitehouse v. Frost.*

F., having bought from D. and B. ten tons of Greenland oil

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mixed with thirty tons more in a cistern, the key of which was in the possession of D. and B., sells the same to T. on credit, and gives T. an order upon D. and B. for delivery of the ten tons, thus:—"Please deliver Mr. T. 10 tons Greenland whale oil, we purchased from you 8 Nov. last." This order was presented by T. to D. and B., who indorsed on it their acceptance thus:—"Accepted, D. and B." F. became bankrupt before the expiry of the credit, and D. and B. (at the request, presumably, of F.'s assignee in bankruptcy) refuse to deliver to T. T. brought an action of *trover* against D. and B., and F.'s assignee, to recover the value of the oil.

The substantial question between the parties was, whether the *right to get delivery of the oil*, which had belonged to F., had become divested out of F. and vested in T. But on the form of pleading the question was further, whether T. had such a right of *possession* in any ten tons of oil, as to enable him to recover *as plaintiff in an action of trover*. The Court decided that T. was so entitled to recover.

That T. was entitled in some form or other to recover the value of the oil seems beyond all question. D. and B. had, as Lord Ellenborough said, attorned to T., and were bound on T.'s request to deliver the oil to T., just as they would have been bound under their original contract, to deliver to F. But the judgment goes further and decides that T. was entitled to recover in this form of action. On this point the decision is inconsistent with the general tenor of the older authorities referred to by Mr. Blackburn; and the subsequent cases of *Austen v. Craven* (4 Taunt. 664), and *White v. Wilks* (5 Taunt. 176), were decided in the Common Pleas on a principle in direct opposition to it.

The decision in *Whitehouse v. Frost*, notwithstanding the explanation, which Mr. Blackburn (p. 126) shows to be a lame one, attempted in the later case of *Busk v. Davis* (2 M. & S. 397), remains an anomaly, and at all events does not prove that *to any substantial effect*, the law recognizes a right to delivery of a certain quantity of goods, while the goods to be delivered are not specifically ascertained, as a right of *property* in any goods. It is now of course impossible that the question can again be seriously raised upon the form of pleading.

*If the goods are specifically ascertained at the time of the contract, the parties are taken to contemplate an immediate bargain and sale of the goods unless there is something to indicate an intention to postpone the transfer of the property until the fulfilment of some condition.*

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If goods are specific, the intention to transfer the property immediately is presumed.

The law carries this intention into immediate effect, and therefore *an agreement for the sale of specific goods is prima facie a bargain and sale of those goods* (Blackburn, p. 147; *Taring v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Gilmour v. Supple*, 11 Moo. P. C. 551, 556; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322).

In some early English law books (*Shepherd's Touchstone* and *Noy's Maxims*) it is assumed that unless credit was expressly given, or "a day set for the payment of the money," the parties to a sale intended a ready money transaction, so that the immediate payment of the price was a condition precedent to the transfer of property in the goods. The presumption is now different, and in the transactions of commerce it is presumed that the parties contemplate an immediate transfer of the property in the goods, and an immediate *obligation* to pay the price, unless there is something to show a contrary intention.

Such a contrary intention may be directly expressed in the contract, or it may be inferred from some stipulation contained in the contract, or from surrounding circumstances such as a custom in the particular trade.

But such presumption may be rebutted by evidence raising a contrary presumption.

The following inference or presumption of law, is important:—

*When by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or where anything is to be done to them (such as measuring, counting, or weighing) by the seller or by the parties jointly, to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transference of the property* (Blackburn, p. 121; see also Benjamin on Sales, p. 235; *Gilmour v. Supple*, 11 Moo. P. C., at p. 568; *Anderson v. Morice*, L. R. 10 C. P., at p. 618).

Presumption where something remains to be done on the part of the seller, &c.

The words in italics form the proposition as stated by Mr. Blackburn. The principle has become so familiar that it is needless to examine the authorities in detail. The following are

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commented on or cited by him:—*Hanson v. Meyer*, 6 East, 614; *Hinde v. Whitehouse*, 7 East, 558; *Rugg v. Minett*, 11 East, 210; *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 1 M. & S. 396; *Austin v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lys*, 4 Camp. 237; *Zagury v. Furnall*, 2 Camp. 240; *Simmons v. Swift*, 5 B. & C. 857; *Laidler v. Burlinson*, 2 M. & W. 602; *Tripp v. Armitage*, 4 M. & W. 687:—and to these may be added *Logan v. Meaurio*, 6 Moore, P. C. 116; and *Acraman v. Morris*, 8 C. B. 449, commented on by Mr. Benjamin.

The words which I have added in Roman type in the second branch of the proposition, are suggested by the cases of *Gilmour v. Supple* (11 Moore, P. C. 557); *Swanwick v. Sothorn* (9 Ad. & El. 895); and *Turley v. Bates* (2 H. & C. 200); showing that where the goods merely remain to be measured by the purchaser for his satisfaction, or where the seller has left the weighing, &c., to be done by the buyer without any further concurrence or supervision by the former, there is no sufficient ground to presume an intention to suspend the passing of the property. The cases of *Tansley v. Turner* (2 Scott, 238), and *Cooper v. Bill* (3 H. & C. 722), show that where the measurements, &c., have been taken and nothing remains but an arithmetical sum to fix the price, there is an end of the presumption against passing the property.

*Appleby v.  
Myers.*

In connection with the topic just considered I must advert to the case of *Appleby v. Myers* (L. R. 2 C. P. 651); a case arising out of a contract, not for the sale of a chattel, but for the erection of fixtures on the premises of the contractee. The plaintiff contracted with the defendant for making and erecting on the premises of the latter certain fixed machinery. There was a specification divided into ten distinct heads, and the document concluded,—“We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work, for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from the date of completion.” Pending the completion of the work the whole premises were destroyed by accidental fire. In an action by the contractor for his work and materials supplied, it was decided by the

Court of Exchequer Chamber, reversing the decision of the Common Pleas, that the plaintiff having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

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The case of *Appleby v. Myers*, though not the case of a sale of a chattel, seems to authorise an extension of the presumption, as stated by Mr. Blackburn: and to support this proposition, *Whatever by the terms of the contract is a condition precedent of the right to payment being earned is presumably a condition precedent for the passing of the property.*

These presumptions will again yield to a sufficiently clear indication, in the terms of the contract that the property is to pass notwithstanding the non-completion of the condition precedent to delivery or ascertainment of the price. And although there is always a presumption that the risk and property in the goods go together, it is quite competent for parties to stipulate that the risk shall be transferred in any goods although the property may not, and *vice versa*.

This presumption again yields to a clear indication of a different intention.

In *Castle v. Playford* (L. R. 5 Ex. 165, and 7 Ex. 98), the plaintiffs agreed with the defendants to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20s. a ton of 20 cwt. weighed on board during delivery.

*Castle v. Playford.*

The vessel having been lost by the dangers of the seas, the question arose whether the purchaser was bound to pay the seller for the ice.

In the Court of Exchequer (May 4, 1870, L. R. 5 Ex. 165) it was held by the majority (Martin and Channell, BB.), that the property could not pass under the contract until the ice was weighed on board for delivery, and that the liability to pay for

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the ice could not arise until then, the only effect of the clause as to the risk being to exonerate the seller from being sued for non-delivery. This view was dissented from by Cleasby, B., who considered that the purchaser was liable to pay under the express terms of the contract by which he undertook the risk.

On an appeal being taken to the Exchequer Chamber (February 1st, 1872, L. R. 7 Ex. 98), all the judges (Cockburn, C.J., and Willes, Blackburn, Mellor, Brett, and Grove, JJ.) were inclined to the opinion that the terms of the contract showed an intention that the property should pass as soon as the cargo was shipped, and the bills of lading in the hands of the purchaser; the case was, however, decided (reversing the decision of the Court of Exchequer) on the ground that the purchaser expressly undertook the risk, and must therefore bear the loss, and pay for the goods according to a fair estimate of their value at the time of going down.

In *North of England Oilcake Co. v. Archangel, &c., Co.* (24 W. R. 162) the sale was of a cargo of seed, "the seed to be delivered at a destined port in sound merchantable condition, and to be worked in thirteen days and paid for in fourteen days from being ready for delivery by cash, &c.;" and the question in the case arose upon a policy of insurance. It was held that the property had not passed at a time when the cargo was in course of landing by lighters; and according to the judgment of Cockburn, C.J., the property would not pass until the delivery was complete.

*Martineau v.  
Kitching.*

In *Martineau v. Kitching* (L. R. 7 Q. B. 436), the plaintiffs, who were sugar refiners, sold to defendant the whole of four fillings of sugar, each "filling" being a quantity of sugar capable of identification and consisting of from 200 to 300 "titlers" or sugar-loaves. The terms were "Prompt at one month; goods at seller's risk for two months;" and the course of business, which was well established between the parties, was that the titlers belonging to each filling were stored on the plaintiff's premises until fetched away by the purchaser or their sub-vendees. The titlers were weighed on removal, each titler weighing from 38 to 42 pounds, those belonging to the same filling being very nearly of uniform weight. If the whole of the lots contained in one sale-note had not (which was frequently the case) been

taken away on the "prompt" day, payment was made (by bill or cash) at an approximate sum calculated on the probable weight; the actual price being afterwards adjusted on the whole filling being cleared. In the case in question a fire had occurred on plaintiff's premises after the expiry of the two months, and while part of the sugar comprised in the purchase remained undelivered. The question was upon whom the loss fell.

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It was held by Cockburn, C.J., that the property had passed under the contract, and that the loss consequently fell upon the buyer. Blackburn, J., inclined to the opinion that the property had passed, but whether at the time of the contract, or on the expiry of the "prompt," or upon payment, he does not clearly express. Lush, J., was of opinion that the property passed from the time of the contract. Both the last named judges came to the conclusion that the loss fell upon the buyer, but rested their decision on the ground that whether the property had passed or not, it was an implied term of the contract that after the two months the risk should be with the buyer, and that he therefore must bear the loss. Quain, J., concurred in the decision that the loss fell on the buyer, but without expressing an opinion whether the property had passed or not.

Again it may be inferred from surrounding circumstances, or it may be expressly agreed, that some condition is to be a condition precedent for the passing of the property; and in such a case the property will not pass unless the condition is fulfilled. This proposition is illustrated by the cases of *Bussey v. Barnett* (9 M. & W. 312); *Barrow v. Coles* (3 Camp. 92); and *Bishop v. Shilito* (2 B. & A. 329 n.); the last mentioned case showing that even delivery is not conclusive of the transfer of property because the delivery itself may have been of a conditional character. Bayley, J., remarked that if a tradesman sold goods *to be paid for on delivery*, and his servant by mistake delivers them without receiving the money, he may after demand and refusal to pay, bring trover for his goods against the purchaser. The case of *Godts v. Rose*, 17 C. B. 229, may also be cited as an instance of conditional delivery. This was a case of sale of five tons of oil "to be free delivered and paid for in fourteen days." An order for transfer of the

Condition precedent expressed or inferred from course of dealing, &c.

Conditional delivery.

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Conditional  
transfer of  
property.

oil was sent to the buyer by a clerk of the purchaser who asked for a cheque in payment. The buyer refused to give the cheque on the ground that payment was only to be made in fourteen days: but insisted on keeping the order. The jury having found that the clerk did not intend to part with the order without a cheque, it was held that the delivery of the transfer order was conditional, and that no property had passed.

So if goods are sent for sale on approval or return no property is transferred until approval (*Swain v. Shepherd*, 1 M. & Rob. 223). And it is a well understood rule in mercantile dealing that where a bill of lading is sent to a vendee of the goods, in a letter which also incloses and requests acceptance of a bill of exchange to cover the goods included in the bill of lading, the acceptance of the bill of exchange is a condition precedent of the passing of the property in the goods (*Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493; 5 H. of L. 116).

I shall revert to the case of *Shepherd v. Harrison* in considering the intention and effect of a shipment of goods. In such cases the question commonly is not only whether the act indicating a delivery and transfer of property is intended to be absolute or conditional, but also whether there is any conclusive appropriation of specific goods to a contract of sale *in genere*.

SECTION II.—WHERE THE AGREEMENT DOES NOT IMMEDIATELY OPERATE AS A BARGAIN AND SALE, WHAT ARE THE CONDITIONS UPON WHICH THE TRANSFER OF PROPERTY IS INTENDED TO TAKE PLACE, AND HOW ARE THESE CONDITIONS FULFILLED.

Simple case  
where sale is of  
specific goods  
to take effect  
on condition.

In the case of sale of a specific chattel, where there is a condition precedent to the transfer of the property, such transfer takes place on the fulfilment of the condition, so that, the existence and nature of the condition being ascertained, there is no further difficulty.

Where goods  
not specifically  
ascertained  
complex  
questions arise.

But where the contract is for the sale of a chattel not specifically ascertained,—whether already existing, as in the sale of an undivided quantity out of a larger bulk; or not yet existing, as in the case of a contract to make and deliver a chattel of a given description,—the case is more complex, and the



question arises, what circumstance will convert the agreement into a contract for sale of a specific chattel, or in other words, how is a specific chattel determined or appropriated as the subject of the contract. When that has taken place the transfer of property immediately follows, unless there is something to indicate the intention to postpone the transfer until the fulfilment of some further condition.

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The question what is an appropriation of a specific chattel as the subject-matter of the contract depends (like the primary contract itself) upon the concurrence of the intention of both parties, actual or presumed.

Specific appropriation.

If at a period subsequent to the original contract, both parties agree that a certain specific subject is to be appropriated as the subject of sale there is at once a bargain and sale complete, and the property is transferred (*Young v. Matthews*, L. R. 2 C. P. 127; cf. *Campbell v. Mersey Docks*, 14 C. B. N. S. 412). In the ordinary case of a contract to supply goods *in genere*, the tender and acceptance of goods as in fulfilment of the contract will transfer the property. But, as already observed (p. 178, *ante*), and as will be further shown in regard to sale by sample, such acceptance may be "conditional" or "provisional," and in the event of the goods proving not according to contract and of their being rejected accordingly, the effect of such delivery and acceptance as a transfer of property will become void.

Appropriation by mutual consent.

It is also competent to the parties, in the original bargain, to agree that certain acts or events contemplated as relating to specific chattels, shall constitute an appropriation of these as the subject-matter of the contract. And if parties do so agree, when on those acts or events being done or happening, an appropriation is made accordingly. On this point the following rules have been established by decisions :—

*An act done by one of the parties in pursuance of a term in the contract, and such as could not be done without appropriating specific goods as the subject-matter of the contract, is construed to be an appropriation by the first with the authority of the other party, and therefore conclusive on both.*

Appropriation by one pursuant to the contract.

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Otherwise  
requires express  
assent.

*An act of one party showing however clearly his own intention to appropriate specific goods for that purpose but not being in performance of a term of the contract, is inconclusive and revocable, unless there is actual assent on the part of the other.*

The cases show the distinction to be very fine, and I doubt whether it is capable of being stated with logical precision. The two cases of *Fragano v. Long* and *Atkinson v. Bell*, which are, as Mr. Blackburn says, on the very boundary line that divides the two principles, appear still to afford the best illustration that can be given.

*Fragano v.  
Long.*

In *Fragano v. Long* (4 B. & C. 219), the plaintiff, who resided at Naples, sent an order to M. & Sons at Birmingham, for certain hardware goods "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." In pursuance of the order a cask of hardware, marked with the plaintiff's initials, was sent by M. & Sons to their own shipping agents at Liverpool with directions to forward same to Naples. An insurance was effected, and the interest declared to be in *Fragano*. The shipping agents delivered the goods on the quay, where the defendant's vessel (about to sail for Naples) was lying, to the mate of that vessel, who gave them a receipt for it. The cask, before being actually put on board, fell into the water and was damaged. *Fragano* having brought an action against the owners of the vessel, they contended that he was not the right person to maintain the action. But the Court of King's Bench held that he was, the ownership of the goods having been vested in him from the moment they left the warehouse of the vendors at Birmingham.

*Atkinson v.  
Bell.*

In *Atkinson v. Bell*, 8 B. & C. 277, the plaintiff was the assignee of *Sleddon*, a person who had been employed by defendants to make, under the directions of one *Kay*, some spinning frames of a certain description patented by *Kay*. *Sleddon* made the frames, which were altered under *Kay*'s superintendence, and packed in boxes by *Kay*'s directions. *Sleddon* then wrote to the defendants informing them that the frames were ready, and begged to know by what conveyance

they were to be sent. Sleddon having become bankrupt, the assignee required the defendants to take the frames, and they refused to do so. The assignees then brought an action for goods sold and delivered, goods bargained and sold, work labour and materials found and provided. It was held by the same judges who decided *Fragano v. Long*, that the action would not lie on any of these counts, because there had been no specific appropriation of the machines assented to by the purchaser.

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In *Borrowman v. Free* (4 Q. B. D. 500), where the vendor, entitled by the contract to make an appropriation, had given notice of an appropriation, but the buyer objected, and the objection was decided, in an arbitration between the parties, to be valid; it was held that there having been no adjudication on the footing of a broken contract, the vendor might still, within the time limited by the contract, make another appropriation of different goods. The buyer having objected and successfully objected to the first appropriation, was in fact not in a position to hold the seller bound by it, so as to prevent his making a second one.

Where appropriation objected to by vendee, vendor may within time limited by the contract make another.

The assent of the buyer to an appropriation which in other respects would be held to be the act of the seller alone, will make the appropriation complete and conclusive. This is illustrated by the case of *Sparkes v. Marshall* (2 Bing. N. C. 761), where B., having sold to Sparkes 500 to 700 barrels of oats "to be shipped by J. & Son," afterwards by a letter of 14th November wrote to Sparkes that he was advised that J. & Son had "engaged room in the *Gibraltar* for about 600 barrels of oats on your account." Sparkes on the following day gave his agent instructions to insure oats per *Gibraltar*. A policy was accordingly effected in Sparkes' name on the 16th. The shipment had in fact been completed on the 14th November. The *Gibraltar* having been lost at sea, and an action on the policy having been brought in Sparkes' name, the underwriters contended that Sparkes had no insurable interest. The Court held that the property had passed to Sparkes, an appropriation having been made of the oats shipped by the letter of

Appropriation by seller alone made good by subsequent assent of buyer. *Sparkes v. Marshall* an instance of such assent.

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*Jenner v. Smith.*

Instance where  
held to be no  
evidence of  
such assent.

14th November, and assented to by the act of Sparkes in insuring.

In *Jenner v. Smith* (L. R. 4 C. P. 270) there was a verbal sale of two pockets of hops, which were then and there inspected, and two other pockets of which samples were shown, but which were lying in a warehouse in London. On his return to London the plaintiff went to the warehouse and selected two out of three pockets which he had there. He directed the warehouse-keeper to mark them to wait orders, but no alteration was made in the warehouse books. On the 4th of November plaintiff wrote to defendant with an invoice of all the hops, and stating that the last pockets of hops were lying to his (defendant's) order. Defendant did not reply until the 8th, when he refused to receive the last two pockets. It was held that there was no evidence which would justify a jury in finding that the appropriation of the two pockets in the London warehouse was either originally authorised or subsequently assented to by the buyer, and that no property in these two pockets had passed.

Appropriation  
by execution of  
order for a  
shipment  
of goods.

The cases in which the shipment of goods in pursuance of orders is relied on as an act of appropriation, deserve consideration.

*Shipment* is a complex act, comprising the collection and preparation of the goods, bringing them upon the wharf where the ship is loading, or by lighters alongside a vessel at anchor, hoisting and stowing them on board, and finally the decision of the shipper as to the disposal of them.

Criterion is the  
completion of  
the shipment as  
an entire act.

It may be stated generally that, where a contract is made for goods *to be shipped*, it is the completion of the shipment considered as an entire act, and not the doing of any one or more of the acts necessary to a shipment, that determines the appropriation of the goods.

There may be  
transfer of  
property  
although the  
relation between  
shipper and  
consignee is one  
of agency.

I may here observe that the relation between the shipper and consignee is often one of agency. But this makes little if any difference in regard to the point now under consideration. The goods must be bought and collected for shipment in the country of the shipper; and, as a general rule, he must buy

and collect them in the first instance as his own; and it is generally the ultimate purpose of a consignment that the property in the goods is to be transferred either to the consignee himself or to some other person acquiring a right through him. In regard to the point of time when the transfer is effected, it makes no difference whether the relation between the consignor and consignee is that of principal and agent, or of vendor and purchaser. Or, to speak more correctly, the relation of vendor and purchaser is truly constituted in such cases, although the parties *also* stand to one another in the relation of principal and agent, or of persons having a joint interest in respect of the goods.

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I observe further, that, as a general rule not only the right of property, but the right of possession, and (generally speaking) the existence of the goods as specific identifiable things, dates from the completion of the act of shipment; and hence it is that in determining the question of property in these cases, no conflict arises between systems of law which require, and those which do not require transfer of possession as essential to the transfer of property upon sale.

The act of shipment is completed by the shipper obtaining the captain's signature to the bill of lading. The form in which this is done generally indicates the shipper's decision as to the destination of the goods. It is however the *intention* of the shipper, and not the *form* in which the bill of lading is taken, which determines the legal effect of the shipment in regard to the vesting of property and the right to possession. If the intention is, in pursuance of the contract, to vest the property and possession at once in the consignee, the intention takes effect accordingly; so that if a simple contract for purchase of goods is carried into effect by the vendor shipping the goods taking the bill of lading in the name of the purchaser, this is conclusive. The property and possession vest at once in the purchaser, and the consignor cannot afterwards by any act or change of intention vary the consignment (*The Constantia*, 6 Rob. 321. Blackburn on Sale, p. 142).

How shipment  
is completed.  
Intention as to  
disposal of the  
property.

But the shipper may intend to reserve to himself the property in the goods shipped; or he may wish to impose some

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term as a condition precedent in order that the shipment may operate as a transfer of the property and possession ; and if the intention is sufficiently clear, the shipment will so operate, even although the contract may be broken thereby.

The chief difficulty consists in determining the inferences to be drawn from the facts and documents as to the *intention of the shipment*. For this purpose it is necessary to consider the cases in some detail.

*Walley v.*  
*Montgomery.*

*Walley v. Montgomery* (1803, 3 East, 585), was a case arising out of a consignment by Schumann & Co., of Memel, under some contract with the plaintiff, Walley of Liverpool. The correspondence is very imperfectly set out in the report, and probably the direct evidence as to the nature of the contract was scanty. On 1st May, Schumann & Co. wrote to the plaintiff a letter informing him that they had chartered the ship *Esther* on his account, and on 15th May again wrote enclosing invoice and bill of lading, and advising that they had drawn bills on the plaintiff at three months for the value of the cargo. The invoice was of this tenor:—"Memel, 9th May. Invoice of a cargo of timber shipped by order and for account and risk of Mr. T. Walley of Liverpool, in the *Esther* ;" and the bill of lading was, "unto order or assigns he or they paying freight for the goods according to charter-party," and was indorsed in blank by Schumann & Co. The defendant, who was an agent of Schumann & Co., obtained possession of the cargo under another bill of lading, and, although Walley was not insolvent, refused to deliver it unless Walley would pay ready money. This Walley declined to do, but offered to accept the bills according to the letter of advice. The defendant persisting in his refusal, Walley sued in trover : and the question was whether the right of property and possession had passed to him before the arrival of the cargo. The Court held that it had passed ; the invoice in the above terms and the sending of the bill of lading being evidence of the intention that the property should upon the shipment, immediately vest in the plaintiff.

*Coxe v. Harden.*

In *Coxe v. Harden* (also in 1803, 4 East, 211), the statement of the correspondence is very meagre. It closes, however, with

a letter of the shippers (B. & Co.) to the consignee (O. & Co.), dated 12th February, 1802, enclosing invoice and *unindorsed* bill of lading, and this letter was as follows :—" Having none of your esteemed favors, we have the pleasure of handing you a bill of lading and invoice of the remainder of the flax we purchased for your account by order of Mr. O., consisting of 18 mats, which are shipped by the *Vrow Junnetie* for your place; the amount being £317. We have this day drawn on you at 2 usances, in favor of L. F. & Co., not doubting it will meet with due honor. We close this account in course." O. & Co. being in embarrassed circumstances, did not accept the bills. B. & Co. sent an *indorsed* bill of lading to their own agent *Coxe*, for the purpose, as alleged, of securing the acceptance of the bills of exchange. On the arrival of the vessel, the defendant *Harden*, who had acquired the rights of O. & Co. with the *unindorsed* bill of lading, obtained the goods from the captain, and sold them. *Coxe* then sued *Harden* for wrongful conversion of the goods. There was a question whether *Coxe* could sue in his own name, but it was unnecessary to decide against him on this point; the Court holding it clear *that the property and right of possession had passed to O. & Co.* It is observed by Mr. Blackburn, in his book on Sale, that the original agreement may be inferred to have been one by which the vendors were not to retain a right of possession until the bills were honoured; and indeed the letter of 12th Feb., 1802, affords some evidence of a specific appropriation independently of the act of shipment.

In *Craven v. Ryder* (1816, 6 Taunt. 433), the contract was for 24 hogsheads of sugar free on board a British ship. C. put 24 hogsheads on board but retained the lighterman's receipt expressing them to be shipped on C.'s account. The Court of Common Pleas decided that C. had never parted with the possession. *Craven v. Ryder.*

In *Ruck v. Hatfield* (1832, 5 B. & A. 632), the facts were similar except that the receipt which was tendered to the mate of the vessel had been kept by him and not signed, and subsequently the master signed bills of lading to the order of the vendee. It was held, in an action against the master, that the *Ruck v. Hatfield.*

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signing of bills of lading in this way was wrong and contrary to the intention of the shipper and that the latter was entitled to recover against him.

*Brandt v.  
Boulthby.*

In *Brandt v. Boulthby* (1831, 2 B. & Ad. 932), the facts were held to amount to a *conditional* appropriation and delivery of the goods.

In June, 1830, one Berkeley of Newcastle, having sent the plaintiffs, who were merchants in Russia, several orders for wheat, directing them to draw for the price upon H. & Co. in London, chartered (amongst other vessels) the *Helena*, a ship belonging to the defendants, for the purpose of receiving and bringing home the wheat. Disputes having arisen between Berkeley and the plaintiffs' agent in London (one E. H. Brandt), Berkeley wrote on the 28th of July purporting to cancel his orders, which he had of course no right to do. The plaintiffs nevertheless shipped the corn and advised Berkeley as follows:—  
"We have succeeded in purchasing a cargo of wheat for the *Helena*, and shall dispatch it as soon as possible to the address of H. & Co., London, which house we shall address to-day with regard to effecting the insurance. We trust what we have done for you will meet with your approval, although by a communication received from Mr. E. H. Brandt, subsequently to our having made the purchase, we learn that you have been induced to cancel the several orders in our hands." The plaintiffs subsequently advised Berkeley of the shipment in these terms:—"St. Petersburg, Aug. 26, 1830. We now have much pleasure in waiting upon you with invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena* (Mann). For the amount of the former, if found correct, you will please give us credit with £810 4s. 5d. *An indorsed bill of lading we have this day forwarded to Messrs. H. & Co. of London*, at the same time drawing upon them for £673 15s., and for the balance remaining thus in our favour, viz., £136 9s. 6d., we make free to value upon you at three months' date, payable in London *to the order of E. H. Brandt*, which draft we recommend to your kind protection." An *unindorsed* bill of lading was inclosed in this letter, and an invoice of "wheat bought by order and for account of



J. Berkeley, Esq., Newcastle, and shipped at his risk to London, to the address of H. & Co. there, per the *Helena*, Captain J. Mann." The indorsed bill of lading was in fact not sent directly to H. & Co. but to the plaintiffs' agent. The bills of exchange mentioned in the letter were presented for acceptance and refused, the refusal of H. & Co. being presumably under Berkeley's directions. The plaintiffs' agent then delivered to H. & Co. the indorsed bill of lading, and requested them to accept the bills on *his* account, which they did. Notice was given to Berkeley on behalf of the plaintiffs that they should retain the whole cargo. Subsequently Berkeley offered to pay the price of the wheat and charges, but it was refused. The captain delivered the cargo to Berkeley, and not to H. & Co., according to the bill of lading. The plaintiffs brought an action against the shipowners for not delivering according to the bill of lading. The question whether they were entitled to substantial damages depended upon the question whether the property in the wheat had passed to Berkeley or not. The Court held that it had not, and that the act of shipment in this case was a *conditional appropriation and delivery* of the wheat, the condition being that Berkeley should accept the one bill and procure the acceptance of H. & Co. to the other.

The *ratio decidendi* is expressed by Parker, J., as follows:—  
"I agree to the law laid down in argument that a contract cannot be rescinded by one only out of two contracting parties, but the question in this case is whether the property in the goods shipped ever vested in Berkeley at all. That depends entirely on the *intention of the consignor*. It is said that the plaintiffs by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct; for looking to the letter of 26th August, it manifestly appears that they intended that the property should not vest in Berkeley unless the bills were accepted."

Mr. Blackburn, in his treatise, comments on the case thus:—  
"The Court seem to have come to the conclusion from the correspondence, that the goods were not shipped for the purpose of appropriating them to the fulfilment of the still existing contract which Berkeley had tried to cancel, but for the purpose of

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offering to Berkeley a substituted contract which he declined." This *ratio decidendi* is certainly suggested by the judgment of Taunton, J. But from the judgments of Tenterden, C. J., and Patteson, J., it may be inferred that they thought it consistent with the original contract to make the acceptance of the bills a condition precedent to the passing of the property. The effect of the decision seems to be that there was sufficient evidence to show that the appropriation and delivery were intended to be conditional; and that this intention must receive effect, whether it was consistent with the original contract or not.

*Wilmhurst v.  
Bowker.*

In *Wilmhurst v. Bowker* (decided by the Common Pleas in 1841, by a judgment subsequently reversed by the Exchequer Chamber), the contract was as follows:—"Sold, the 25th of October, 1830, to Messrs. J. Wilmhurst & Son, about 300 quarters of wheat, as per sample, at 51s. per quarter on board. Payment by banker's draft on London at two months' date to be remitted on receipt of invoice and bill of lading." The defendants under the contract shipped wheat on board a general ship, the bill of lading making it deliverable "to order or assigns he or they paying freight." The defendants insured the wheat and charged the premium to the plaintiffs, and they sent the bill of lading to the plaintiffs indorsed generally, with an invoice stating the wheat to be shipped by order and for the account and risk of the plaintiffs. The plaintiffs sent back a draft, but not a banker's draft, and the defendants retook possession of the wheat. The plaintiffs having brought an action for damages for stopping the wheat, the Court of Common Pleas (2 M. & G. 792) held that although the property in the wheat passed to the vendees under the contract, the possession was not intended to vest until they remitted a banker's draft. The Court of Exchequer Chamber however (7 M. & G. 882) reversed the judgment, and held that this inference could not be drawn from the contract, observing that the delivery of the bill of lading and remitting the banker's draft could not be simultaneous; the plaintiffs must have received the bill of lading and invoice before they could send the draft. It is to be observed that, from the form in which

the case came before the Court, it was in effect admitted that the defendants caused the wheat to be shipped and possession delivered to the master, to be by him carried and *delivered to the plaintiffs on the terms of the agreement*. So that there was no question whether the intention of the shipment was or was not according to the contract, and the only question was what was the intention of the contract.

In *Wait v. Baker* (1848, 2 Ex. 1), the contract was made by correspondence between the defendant, a corn-factor, at Bristol, and L., a person who was in the habit of buying in the local markets in the South Hams. After preliminary correspondence, L. wrote on 14th December, 1846, sending some samples of barley, and saying:—"I will engage to sell you from 400 to 500 quarters f. o. b. barley at Kingsbridge or neighbouring port at 40s. per quarter for cash on handing bill of lading, or acceptance, &c." This offer was accepted, and subsequently L. chartered a vessel in his own name, sent defendant a copy of the charter-party, and wrote to him when the loading was about to commence, and when the vessel was about to sail, on each occasion mentioning his expectation of sending bill of lading at an early date. On the 7th January, L. received from the master of the vessel the bill of lading of the cargo deliverable at Bristol to the order of L. or assigns paying the freight as per charter. On the 8th, at an early hour, L. called at the defendant's counting-house at Bristol, and left the invoice and an *unindorsed* bill of lading. Later in the day he called again and saw defendant, and a dispute having arisen, L., notwithstanding an offer by the defendant to accept the barley and pay cash for it, took away the bill of lading from the counter, and indorsed it for value to the plaintiffs. The defendant having on arrival of the vessel obtained delivery of a part of the barley, the plaintiffs brought an action in *trover* for the part so delivered.

It was held by the unanimous decision of the Court of Exchequer that no property in the barley had passed to the defendant at the time of the indorsement of the bill of lading to the plaintiffs. Parke, B., in giving his reasons for this judgment, said that the delivery of the goods on board ship was not

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a delivery of them to the defendant, but a delivery to the captain of the vessel to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By the bill of lading the goods were to be carried by the master of the vessel for and on account of L. to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continue in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on the part of L. After a discussion of the word appropriation in various senses, he said that there was nothing which amounted to an appropriation in the sense of that term which alone would pass the property. The result was that in this action of trover the plaintiffs claiming under L. by the indorsement of the bill of lading are entitled to the property: and that Mr. Baker has his remedy against L. for the non-fulfilment of his contract, which he clearly has not fulfilled. Baron Alderson's judgment was to the following effect:—"The circumstances of the case clearly show that when the cargo was put on board the vessel, the property in the cargo did not pass. The vendor at that time chooses a certain quantity of corn, which he intends to offer to the party in pursuance of his contract; but he keeps it as his property in the meantime. Such being the state of matters, the property in that state, arrived at Bristol, and there is nothing to show that there was any transaction which amounted to an agreement between the parties to alter that arrangement; therefore the property did not pass at all, and as the one party has not tendered the barley in pursuance of his contract, the other party has his action against him."

*Van Casteel v.  
Bowker.*

In *Van Casteel v. Bowker* (11 July, 1848, 2 Ex. 691), coffee purchased by L. & Co. on their own credit principally, but partly with funds supplied by B. & Co. (the bankrupts) at Liverpool, was shipped by L. & Co. on board B. & Co.'s ship. An invoice was made out stating the coffee to be shipped on account and risk of B. & Co., but L. & Co. procured the captain of the ship to sign bills of lading making the coffee deliverable to their own order and assigns freight free. One of the bills

was indorsed in blank by L. & Co., and immediately transmitted by them by post to the bankrupts. In an action of trover (amongst other questions) the question was whether the property and right of possession had passed on shipment to B. & Co. Parke, B., in delivering the judgment of the Court granting a new trial, stated that this question depended on whether the coffee was put on board to be carried for and on account and risk of the bankrupts, or not. (If it was, the *transitus* was at an end, the ship being the bankrupts' own.) Upon that question the *form* of the bill of lading was material, and had been, in the cases of *Ellershaw v. Magniac* (see below) and *Wait v. Baker*, held to be conclusive; but notwithstanding the form of the bill of lading, the contract of carriage may have been made on behalf of the vendee, and it was a question for the jury to be decided on the evidence, looking at the form of the bill of lading (particularly noticing that it is made *freight free*), and the language of the invoice, and the immediate transfer of the bill of lading to the bankrupts, and other facts, whether the goods were not really delivered on board to be carried for and on account and at the risk of the bankrupts.

On the new trial the jury found that the goods were put on board for and for account of L. at the risk of the buyer, and the Court refused to set aside a general verdict for the defendants entered on this finding (Benjamin on Sales, 2nd ed., p. 298).

In the case of *Ellershaw v. Magniac*, referred to in the last case, but not reported until afterwards, 6 Ex. 570, an Odessa firm, being bound by contract to deliver linseed, put a quantity on board a vessel chartered by the plaintiff for the purpose, took the bills of lading to their own order or assigns, paying freight according to charter-party, and then, being in difficulties, assigned the bill of lading to the defendants. The Court were of opinion that there was not such a delivery of goods as to vest the property or right of possession in the plaintiff; the circumstance of the shippers making the linseed deliverable to order by bill of lading clearly showing the intention to preserve the right of property and possession in themselves, until they had made an assignment of the bill of lading to some other person; and though the goods might have

*Ellershaw v.  
Magniac.*

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*Jenkyns v.  
Brown.*

been purchased with an intention that they should be delivered to the plaintiff, that intention was never executed.

In *Jenkyns v. Brown* (18 Dec. 1849), 14 Q. B. 496, the form of the action was in trover, and the question was in whom the property and right of possession was vested after the shipment.

The facts were that K. & Co., the plaintiff's agents at New Orleans, had purchased corn with their own money and shipped it for Liverpool, taking the bills of lading deliverable to their own order. They drew bills of exchange on the plaintiff for the price, and, according to what is stated to have been a common practice at New Orleans, sold the bills of exchange, and indorsed to the purchaser the bills of lading giving him authority to sell the corn if the bills of exchange were not paid. K. & Co. then advised the plaintiff of the shipment and of the delivery of the bills of exchange, requesting him to accept them, and adding, "bills of lading as before accompany the draft." In the letter also was enclosed the invoice which stated that the corn was "consigned to order, by order, and for account and risk" of the plaintiff. The bills of exchange were not paid.

The judge at the trial told the jury that no property in the corn had passed to the plaintiff, except upon the condition of his paying the bills of exchange. On motion for a new trial, before Coleridge, Wightman and Erle, Justices, the legal effect of the transaction was stated in the judgment as follows:—

"Although K. & Co. bought the corn in question abroad as agents for the plaintiff, yet as they paid for it with their own money, it became their property; and after shipment, the cargo continued their property, as there is no evidence of an intention that it should pass, and as the taking of a bill of lading deliverable to their own order, is nearly conclusive evidence that it did not pass. By delivering this bill of lading, indorsed to the defendants, as a security for the payment of the bills of exchange drawn on the plaintiff for the value of the cargo, and giving power to sell in case of failure of payment (the bills of exchange having been purchased by the defendant), they passed to the defendants for value a special property in

the cargo ; and by afterwards sending the invoice with the bills of exchange and letters of advice to the plaintiff they passed to him the general property in the cargo subject to this special property. Under this arrangement the plaintiff's right of possession would not arise till the bills should be paid."

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*Turner v. Trustees of Liverpool Docks* (May 20, 1851), 6 Ex. 543, was a case in the form of an action for detainee, in which the question was fully considered of the consignor's right to make a conditional delivery of goods on board the consignee's own ship, and the mode in which such a conditional delivery may be effected.

*Turner v.  
Trustees of  
Liverpool Docks.*

B. & Co. of Liverpool send M. & Co. of Charlestown a consignment of goods by B. & Co.'s own ship *Charlotte*, and request M. & Co. to buy cotton for the homeward voyage which they do, and advise departure of ship sending abstract of invoice of cotton "shipped by M. & Co. on board the *Charlotte* for Liverpool by order and for account and risk of B. & Co. there, and addressed to order." M. & Co. further, on 23d Oct. 1847, write inclosing invoice and stating as follows:—"The bank, to whom our drafts on you were sold, required the delivery of bill of lading, which we thought it best to comply with, and thereby obtained the very highest rate of exchange that, &c." The invoice itself so far differed from the abstract of it, that instead of "addressed to order," it had the words "and to them consigned." The bill of lading was—"Shipped, &c., by M. & Co. . . . unto order or to our assigns, he or they paying freight *nothing being owner's property.*"

It was contended by the plaintiffs, who were the assignees in bankruptcy of B. & Co., that by delivery of the goods on board the bankrupts' own ship, specially appointed for the purpose of bringing home those goods, and such delivery being made to the master, who was the bankrupts' agent to receive them, the absolute property vested in the bankrupts, the sale being completed by the acceptance of the order and the terms of the invoice ; and that the terms of the bill of lading, by which the goods were to be delivered at Liverpool to order or *our* (M. & Co.'s) assigns, did not prevent such absolute property vesting in the bankrupts, more especially as it was stated that

## SALE OF GOODS.

no freight was to be paid for the cotton, being owner's property, which was inconsistent with the property remaining in M. & Co. It was also further contended for the plaintiffs that the captain had no power to bind the bankrupts by the special terms of the bill of lading, and that the delivery must be taken to be absolute to the vendors.

On the part of the defendant, it was contended that M. & Co. had never parted with the property in the goods to the bankrupts, but had reserved it until they were paid their purchase money, notwithstanding the terms of the invoice, and the statement in the bill of lading that no freight was payable for the cotton.

The Court were of opinion that the defendants were entitled to judgment. "There is no doubt," they said, "that a delivery of goods on board the purchaser's own ship is a delivery to him unless the vendor protects himself by special terms restricting the effect of such delivery. In the present case the vendors by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or assigns; and there was not therefore a delivery of the cotton to the purchasers as owners though there was a delivery on board their ship. The vendors still reserved to themselves at the time of delivery to the captain,

the *jus disponendi* of the goods without which it may be assumed that the vendors would not have delivered them at all." They considered that the only effect of the form and expression of the invoice or bill of lading was to indicate the terms on which the goods were to be carried, and that the operative terms of the bill of lading, and the terms of the letter of M. & Co. of 23d October clearly showed, notwithstanding the invoice and the expression in the bill of lading as to "owner's property," that M. & Co. had no intention when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts. As to the captain's power to receive the goods on the special terms, they decided, without prejudging the question whether the owners as such might have been entitled to freight as on a *quantum meruit*, that "as M. & Co. delivered the cotton on board upon special terms which the captain was not bound to accept, but without which they would not have delivered them



and which would preserve to themselves the control over them, the bankrupts cannot treat the delivery to their captain as a delivery to them as their property, when it was expressly agreed that they were not to be delivered to the bankrupts but to the order of the vendors; and the want of authority of the master to accept them on such terms will not have the effect of vesting the property absolutely in the bankrupts.”<sup>1</sup>

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In *Key v. Cotesworth* (8th May, 1852), 7 Ex. 595, the defendants (C. & Co.), who were the London agents of Messrs. K. & Co. of Glasgow, had at K. & Co.'s request, written to the plaintiff (M. & Co. of Madras), opening a credit in their favour to enable them to execute an order by K. & Co. for Madras handkerchiefs “for the cost of which as produced you may draw on us at the customary date on forwarding bills of lading to our order and timely orders for insurance.” In the course of business so inaugurated the plaintiffs shipped goods on the 9th of October, 1847, stating in the invoice that the goods were “consigned to Messrs. C. & Co. (the defendants) on account and risk of Messrs. K. & Co. Glasgow.” The plaintiff took the bill of lading “unto Messrs. C. & Co. or to their assigns they paying freight, &c.,” and sent it, accompanied by the invoice, in a letter to the defendants to this effect:—“By desire of Messrs. K. & Co. we have pleasure to hand you herewith invoice and bill of lading for, &c. . . . shipped in the *Essex* to your care, and we have as usual drawn upon you at 6 months for the equivalent of the amount of invoice, £ , which will doubtless meet with due honour. We leave the insurance to be effected on your side.”

*Key v.*  
*Cotesworth.*

The goods arrived and were received by the defendants, under the bill of lading and sold by them, but Messrs. K. & Co.

<sup>1</sup> In *Ogle v. Atkinson*, 5 Taunt. 759, the captain after receiving the goods on board the plaintiff's ship as plaintiff's own goods, was induced to sign bills of lading to order, by a fraud of the shippers, who represented it as immaterial. The fact of delivery on board the plaintiff's own ship was in that case held conclusive of

the ownership. An instance of the simple circumstance of goods put on board the purchaser's own ship under a bill of lading making them deliverable to the purchaser or assigns, and where of course the property passed, is to be found in the case of *Schotsmans v. Lanc. and Yorks. Ry. Co.*, L. R. 2 Ch. 332.

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having failed, the defendants refused to accept the bills of exchange. The plaintiffs claimed the price of the goods on the grounds, *first*, that they were entitled to stop them *in transitu* as not having reached Messrs. K. & Co. (a ground which could not be supported as there is no suggestion that the defendants were mere forwarding agents); and *secondly* that the plaintiffs delivered the goods subject to a condition, which was not fulfilled, namely, that the defendants should accept the bills.

The judge at the trial ruled that the sale to K. & Co. was absolute and not conditional; that the property vested in them upon the delivery on board the ship and the transmission of the bills of lading to the defendants: and that the plaintiffs could not maintain the action against the defendants, who had received the goods and disposed of them under the authority of K. & Co. The Court (in a judgment delivered by Parke, B.) decided that this ruling was correct; and they observed, "If it had been the intent of the vendors to preserve the right in the property until the bill drawn against it was accepted, he ought to have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the acceptance took place. Having delivered them without that qualification the property vested in K. & Co. or the defendants as their agents."

*Brown v. Hare.*

In *Brown v. Hare* (1858, 1859, 3 H. & N. 484; 4 H. & N. 822), the plaintiffs, who were merchants at Rotterdam, contracted through a broker named Goolden at Bristol, to sell to the defendants, who were merchants at Bristol, ten tons best refined rape-oil "to be shipped free on board at Rotterdam in September, 1857, at £48 15s. per ton, to be paid for, on delivery to the defendants of the bill of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil." On the 7th of September the plaintiffs, having been requested by defendants to send part of the oil by the first vessel from Rotterdam, which was the *Sophie*, advised that five tons of the oil would be shipped on the following day. On the 8th, the plaintiffs shipped on board the *Sophie* (a general ship) five tons of the oil, taking the bill of lading "unto shippers' order or their assigns," and they on same day indorsed one of

the bills to the order of the defendants, made out an invoice "by order of Goolden for account of Hare," and wrote to Goolden enclosing the bill of lading, the invoice, and a bill of exchange drawn on the defendants in accordance with the contract. The following day, the 9th, the *Sophie* was run down in the Channel and the oil totally lost. The plaintiffs' letter arrived in due course on the 10th. On the 11th Goolden, who knew of the loss, left with the defendants the bill of lading and invoice, and the bill of exchange for acceptance. Two hours later the defendants, having in the meantime heard of the loss, returned the documents, saying they were not liable to pay for the oil. The remaining five tons were shipped by another vessel, arrived in course and were duly paid for.

The plaintiffs brought their action for not accepting the bill of exchange, and for goods sold and delivered. They obtained a verdict, the jury intimating their opinion that according to mercantile usage, the risk of the loss was on the defendants.

It was held by a majority of the Court of Exchequer (Pollock, C.B., Martin and Channell, BB., *dissentiente* Bramwell, B.) that the property in the oil had vested in the defendants, and that the plaintiffs were entitled to recover on both counts.

Bramwell, B., considered that there was no delivery or appropriation. That there clearly was none by the mere act of the plaintiffs in putting the oil on board: nor by the taking of the bill of lading, which was taken in the shippers' own name: nor by the indorsement, which it remained in their power to erase or alter. Whether the property vested by the bill of lading so indorsed being sent to Goolden depended on whether Goolden was in any way the agent of the defendants, and Baron Bramwell thought he was not.

The judgment of the majority after stating the facts and mentioning the cases of *Wait v. Baker*, *Turner v. Liverpool Docks* and *Van Casteel v. Bowker*, proceeded:—"We think they are all distinguishable. If at the time the oil was shipped at Rotterdam, the plaintiffs had intended to continue the ownership, and had taken the bill of lading in the terms in which it was made for the express purpose of continuing the ownership and exercising dominion over the oil, they would in our opinion have broken their contract to ship the oil free on board, and the

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property would not have passed ; but if when they shipped the oil they intended to perform their contract and deliver it free on board for the defendants, we think they did perform it, and the property in the oil passed from them to the defendants. If when the bill of lading was made out, they of purpose and design had the oil made deliverable to "shippers' order" for an advantage and benefit to themselves, it would be a different case ; but if they had no object in the matter,—and they clearly had none, for upon the same day they indorsed it specially to the defendants, and transmitted it to Bristol—we think it exactly the same thing as if the bill of lading had originally been made out deliverable to defendants.

"It was said that so long as the bill of lading was in the hands of the plaintiffs or of their agent, Mr. Goolden, they had the control over the oil, and no doubt they had to a certain extent, but they would have had precisely the same control whether the bill of lading was made out deliverable to the defendants' or to the plaintiffs' order and indorsed by them to the defendants. It is clear that it was intended by the contract that the plaintiffs should have the control ; for the delivery of the bill of lading to and the acceptance of the bill of exchange by the defendants were to be contemporaneous acts, and the plaintiffs or their agent were not bound to deliver the bill of lading until they received the acceptance.

"In all the cases cited on behalf of the defendants, the bills of lading were designedly and of purpose made out to shippers' order to prevent the property passing, and enable the vendor to retain the possession and control of the goods. This distinguishes them from the present case."

On appeal to the Exchequer Chamber this judgment was unanimously affirmed. "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to ; and under that we think the property passed when the goods were placed 'free on board' in performance of the contract. . . . The real question has been on the intention with which the bill of lading was taken in this form ; whether the consignor shipped the goods in performance of his contract to place them free on board ; or for the purpose of retaining

a control over them and continuing to be owner contrary to the contract, as in the case of *Wait v. Baker*, and as is explained in *Turner v. The Trustees of the Liverpool Docks* and *Van Casteel v. Bowker*. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the Court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances, and therefore the judgment must be affirmed."

*Joyce v. Swan* (1863, 17 C. B. N. S. 84) was a case where in answer to a letter, 26th February, 1863, advising the approaching despatch of a cargo from Liverpool to Londonderry, the shippers received from the intended consignee and vendee a letter, which was ultimately construed by the Court as a *grumbling assent* to the price charged; and the shipper, not feeling sure of the meaning, and as a precautionary measure in case the cargo should not be accepted, took the bill of lading in his own name. The consignee, notwithstanding his letter, had insured the goods; and on Saturday, the 7th of March, in conversation with S. (a partner of the shipper's firm who was then in Ireland) said that he was quite willing to take the cargo. On Monday the 9th, he received from S. the bill of lading duly indorsed, and accepted a bill of exchange for the price of the cargo. On the same day news arrived that the ship had been wrecked on the evening of Saturday the 7th. The question was whether the consignee had an insurable interest. It was decided that he had. For this it would have been doubtless sufficient to show that the goods were, under contract, at his risk. But the decision goes to the extent that they became his property upon shipment, this having been clearly the intention of both, unless the letter of 26th February meant refusal to accept the shipment which the Court held it did not. The *prima facie* intention as appearing by the form of the bill of lading was thus controlled by the clear evidence of the real intention.

In *Moakes v. Nicolson*, 1865, 19 C. B. (N. S.) 290, the circumstances were these:—Pope, a London coal-merchant,

*Moakes v.  
Nicolson.*

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when at Hull, entered into a verbal contract with one Josse there for the purchase of a cargo of steam-coal to be shipped on board a vessel chartered by Pope. The terms of the sale, as found by a jury at the trial, were *for cash against bill of lading in the hands of the seller's agent in London*. The vessel being loaded and ready to sail, Josse wrote to Pope advising him thereof, and enclosing his account with an invoice and bill of lading. The bill of lading had been made out in triplicate; one copy was stamped and retained by Josse, and the copy sent to Pope was unstamped. By the bill of lading the coals were deliverable "unto Pope or order on being paid freight, &c."

Pope not having paid for the coals, the defendant, who was Josse's agent in London, served the captain of the vessel on her arrival at Gravesend with a notice, purporting to stop the goods *in transitu*, and requiring him to deliver them to Josse or the defendant as his agent. The coals were claimed on the other hand by the plaintiff who had bought and paid for them (as it appeared at the trial) before the cargo was completed, and who produced the bill of lading which had been sent to Pope.

It was held by the Court of Common Pleas (Erle, C.J., Byles and Keating, JJ.), that the intention of the contract, according to the finding of the jury which appears to have been warranted by the evidence, was that the coals were only to vest in Pope upon payment by him of cash against the bill of lading; and, this condition not having been complied with, the property was never divested out of Josse. And Moakes, not having in any way acted on the faith of the bill of lading which had been sent to Pope, was in no better position than his vendor. If he had been induced to purchase or to pay for the coals by means of the bill of lading which Josse had with some want of caution placed in Pope's hands the case would have been different, but as it was the plaintiff had merely purchased from Pope his right to a quantity of coals not specifically ascertained, and in regard to which (although subsequently ascertained in specie) no act had been done to transfer the property.

In *Shepherd v. Harrison* (1869, 1871, L. R. 4 Q. B. 196, 493;

H. of L. Ap. 116), the material facts were these:—The plaintiff who carried on business as a cotton and general merchant at Manchester under the name of S. & Co., had various dealings with P. & Co., who were merchants at Pernambuco. In 1867, under orders of the plaintiff, P. & Co. purchased a quantity of cotton. At this time P. & Co. had funds of the plaintiff's in their hands, but were directed not to apply these to the cotton purchases. P. & Co. accordingly write,—“We shall value upon you forwarding bill of lading.” And subsequently they advise as follows:—“We beg now to inclose invoices of 339 bales cotton per *Capella*, costing £1616 8s. 8d., and 208 ditto by *La Plata*, costing £883 7s. 1d. We have drawn upon you, as per note at foot, for the same, to which we beg your protection. We are afraid the *Capella* will not be able to take the other 200 bales, therefore it will be well to insure per steamer or sailing vessels. . . . The bills of lading will be handed to you by Messrs. G., P., & Co.” G., P., & Co. were the agents in Liverpool of Messrs. P. & Co.

The invoices were made out “on account and risk of Messrs. S. & Co.” The bills of lading for the two lots so advised were sent to G., P., & Co., and sent on by them to the plaintiff in a letter inclosing bills of exchange for the price and requesting his acceptance. These bills of exchange were duly accepted and paid, and the goods received under the bills of lading. A dispute however arose as to the quality of some of the cotton.

The remaining 200 bales above referred to were shipped by Messrs. P. & Co. by defendant's steamer, the *Olinda*. On 12th November, 1867, P. & Co. write,—“Enclosed please find invoice and bill of lading of 200 bales cotton, shipped per *Olinda*, costing £861 2s. 7d., and which we hope may prove correct and satisfactory. We have advanced the captain £55 6s. 6d., as per receipt enclosed. . . . We have therefore drawn upon you for £916 9s. 1d., draft No. 935 favour of G., P., & Co., to which we beg your protection.” The bill of lading, which was made out to shipper's order, was however not sent in this letter, but in another letter to G., P., & Co., who, on receiving it sent it on to the plaintiff in a letter saying,—“Our Pernambuco letters to 12th ult., are just to hand, and we beg to enclose bill of lading for 200 bales cotton, shipped by

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MESSRS. P. & Co., per *Olinda*, S.S., on your account. We hand also the draft on your good selves, for cost of the cotton to which we beg your protection, £916 9s. 1d." The plaintiff refused to accept the bills, alleging that the former bills were in excess of price and also that some of the parcels had been disconform to order. He however kept the bill of lading and sent it to his broker with instructions to obtain the cotton. G., P., & Co. having demanded the cotton under a duplicate bill of lading and indemnified the defendants, the latter refused to deliver to the plaintiff, and an action was brought accordingly for *conversion* of the cotton.

The question whether the plaintiff was entitled to recover depended on whether the right to the possession of as well as the property in the cotton had passed to the plaintiff. For even if the *property* had passed, if the right to the possession had not vested in the plaintiff, they could not have succeeded in the action.

Queen's Bench,  
1869.

In the *Queen's Bench*, Cockburn, C.J., considered the authorities conclusive to show that where the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, he indicates the intention that the handing over the bill of lading and the acceptance of the bill or bills of exchange should be concurrent parts of one and the same transaction. He thought it a possible view that where a foreign agent buying goods, at once ships them on account and at the risk of his principal, and calls upon the principal to insure the goods, the *property* would at once pass to the consignee (as the risk certainly would). But whether the property passed or not he considered the consignor entitled to impose conditions on the delivery of possession, and that he effectually did impose such conditions by the course he took.

Mellor, J., came to the conclusion that it was the intention of the consignors, in sending the bill of lading indorsed in blank accompanied by the bill of exchange to their agents, to retain the *right of property* until the bill was accepted. And that the agents in sending to the plaintiff the bill of lading accompanied by the bill of exchange for acceptance, did so in the confidence that he would not keep the bill of lading without accepting the



l of exchange ; and that on the plaintiff so acting, the defendants were entitled on the orders of the consignor's agents, to refuse delivery to the plaintiff.

Hannen and Hayes, JJ., concurred, the latter indicating an opinion that the property as well as the right to the possession remained with the consignors.

In the Exchequer Chamber the judgment of the Queen's Bench was confirmed by the Court, consisting of Kelly, C.B., Willes, J., Channell, B., Montague Smith, J., and Cleasby, B. The three first named agreed that the intention was only to transfer the property conditionally. Montague Smith, J., was of opinion that the judgment of the Queen's Bench should be affirmed. Cleasby, B., expresses a doubt, but did not formally dissent from the judgment of the rest.

Before stating the judgments on appeal to the House of Lords in this case, I must explain the meaning of a phrase which I have hitherto avoided as unnecessarily multiplying expressions to denote the same idea. The expression *jus disponendi* properly denotes the *property* (general or special) accompanied by the *right of possession*, but is sometimes incorrectly applied to the latter right alone. The expression also conveys a caution against the assumption that the property is necessarily accompanied by the *risk*. Reservation of the *jus disponendi* merely means *imposing a condition precedent upon the transfer of the property*. *Jus disponendi.*

On the appeal, Lord Chelmsford (L. R. 5 H. L. 123), after recounting the facts, said,—“The question is, whether under these circumstances the plaintiff was entitled to the possession of the goods. The question with regard to the property may perhaps be a different question ; but the question now is, whether he was entitled to have the possession of the goods on the production of the bill of lading, and whether the defendants are liable to an action of trover for refusing to deliver the cotton to him, and for delivering it to P. & Co.” After referring to the cases of *Walley v. Montgomery*, *Coxe v. Harden*, and *Moakes v. Nicolson*, he observed that in Mr. Benjamin's treatise on Sale, a book which he referred to as very ably

*Shepherd v. Harrison.*  
Appeal to House of Lords, 1871.

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written, the authorities on the subject of reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage:—"The following seem to be the principles established by the foregoing authorities: first, where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee; secondly, where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. This principle runs through all the cases and is clearly enunciated by Baron Parke and by Mr. Justice Byles in *Wait v. Baker* (2 Ex. 1) and *Moakes v. Nicolson* (19 C. B. N. S. 290)."

Lord Westbury (p. 128), said that the effect of P. & Co. delivering the cotton to the captain of the *Olinda*, and taking from him the ordinary bill of lading to their own order was, in law and according to mercantile usage, that they controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. "The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had therefore all the incidents of property vested in themselves. Now that was by no means inconsistent with the special terms of the shipment, namely, that the cotton was shipped on account of and at the risk of the buyers. That is perfectly consistent with the property, as evidenced by the bill of lading, remaining in the possession of the vendors of the cotton in question.

"Then if that be so, it is incumbent on the buyers to adduce circumstances to control the legal effect of that transaction, and to show that the evidence of ownership and of the right to deal with the property consequent on the authority of the bill of lading, are controlled by other facts, and that it was not

intended to retain the right of possession, and the interest in the property shipped, and the right of disposing of it, in the holder of the bill of lading. Undoubtedly the obligation to show this lies upon the individual who contradicts what would otherwise be the ordinary legal conclusion from that transaction."

Then, after commenting on the circumstances and the mode in which the documents were transmitted, he concludes:—"I think the truth of the case was this, that the two documents were originally intended to be dependent the one on the other, and that they were sent together under the conviction and in the confidence that the bill of exchange would be accepted and returned to the sender in consideration of the bill of lading. That however was not done, and therefore I take it that the bill of lading acquired in that manner gave no right of property to the present appellant (the plaintiff), and that the judgment of the Court below was therefore correct, and ought to be affirmed."

Lord *Colonsay* thought that the plain meaning and intention of the parties was, that the bill of lading should be retained only if the bill of exchange were accepted, and therefore it was incumbent on the plaintiff, if he meant to refuse the acceptance of the bill of exchange, to return also the bill of lading; and was, therefore, clearly of opinion that the judgment of the Court below was correct.

Lord *Cairns* said that in order to succeed the plaintiff must show that at some period or another the property in this cotton passed to him, and that the first question necessary to ask was,—When did the property pass to the plaintiff? "In the invoice the goods are described as being shipped on account and at risk of the plaintiff. But along with the invoice a bill of lading was taken from the captain making the cotton deliverable not to the plaintiff, but to the shipper on board. It is perfectly well settled that, in that state of things, the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading." He had no doubt that by what was done at Pernam-

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bucó the intention of the shipper, which was communicated to the consignee by the letter informing him that the bills of lading and bills of exchange had been transmitted together to the agent of the shipper in Liverpool, was that the shipper of the cotton should remain, and that they did remain masters of the property. Then as to whether there was any change of property made by what was done at Liverpool, he thought that "when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in enclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange. Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in England receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other. . . . I think the conclusion come to in the Courts below was perfectly right. I believe that what was done in Pernambuco did not vest the property in the plaintiff, and that what took place in Liverpool did not vest the property in him, but that the property remained in the shippers; and the action therefore, in my opinion, ought to fail."

*Garbaron v.  
Kreeft.*

In *Garbaron v. Kreeft* (1875, L. R. 10 Ex. 274), the question was whether the property had passed to the defendant as purchaser, in 400 tons of iron ore shipped at Cartagena on board a vessel called the *Trowbridge*.

The defendant bought from one M. all the ore of a certain mine in Spain, to be shipped by M. f.o.b. at Cartagena, on ships to be chartered by defendants or by M. . . . "You (M.) binding yourself to load the said vessels chartered by you when they arrive on your side, and also such vessels as we may charter. Payment for the ores to be made by your drafts upon us at 14 days date if drawn against B./L., at 3 months date if drawn against charter; if the latter mode of payment is adopted

you are bound to send us with advice of each draft an attested certificate that the quantity of ore drawn for is actually in stock ; and that this ore is to be considered our property, &c." In March, 1872, when the *Trowbridge*, one of the ships chartered by the defendants, arrived at Cartagena, the payments that had been made exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded ; so that had M. shipped ore on the *Trowbridge*, he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, he, on the 8th of April, and before any ore was put on board the *Trowbridge*, picked a quarrel with the defendants, telegraphed to them that he would not load the *Trowbridge* on their account, and though they telegraphed to him threatening him if he did not, he loaded the *Trowbridge* and took bills of lading making the shipment to be by one S. (a fictitious name), and the cargo deliverable to S.'s order. He then indorsed S.'s name and his own on the bill of lading and pledged it to the plaintiffs. By the terms of the charter-party the captain was to sign bills of lading as presented. The question was whether the plaintiffs or defendants were entitled to the cargo, and according to the judgment delivered, this depended on whether the property in the ore had become divested out of M. and vested in the defendants, either by the operation of the contract itself, or by the acts of M. in placing it on board the chartered ship.

Bramwell, B., after stating the facts to the above effect, and after observing that notwithstanding the terms of the contract as to the property passing on payment being made, it was impossible that any quantity of ore which had not been specifically ascertained should become the property of the defendants, and after referring to *Ogle v. Atkinson*, as showing that the taking of the bill of lading to shipper's order would not have divested the property out of the defendants if it had passed to them, said that the question was reduced to this :—"Did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but

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taking, when he does take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable?" Then, after commenting on *Ellershaw v. Magniac*, *Turner v. Liverpool Docks*, *Falke v. Fletcher*, 18 C. B. (N. S.) 400, *Wait v. Baker*, and *Moakes v. Nicolson*, he said:—"The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him." He therefore gave judgment for the plaintiffs.

Cleasby, B., also gave judgment for the plaintiffs, stating the effect of the authorities as follows (p. 285):—"The delivering of goods contracted for on board a ship when a bill of lading is taken is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and this may apply equally when the ship is the ship of the vendee." He also considered that the clause in the charter-party which authorised the captain to sign bills of lading as presented, if it did not give the *bond fide* holder of the bill of lading a title by estoppel against the defendant, much strengthened the conclusion that M. acted throughout with reference to the power so reserved to him.

Kelly, C. B., gave judgment for the plaintiffs on the sole ground that the authority given by the defendants by the terms of the charter-party created an estoppel in favour of the *bond fide* holder of the bill of lading. He however considered that the ore became the property of Kreeft as soon as he had accepted beyond the amount of the price, and it had been separated from the bulk of the stock—so that, but for the estoppel, the property, in at least the ore put on board, would have passed to Kreeft.

It does not however appear whether there was any act of separation from the stock by M. before he intimated that he would not ship for the defendants, and if there was it does not appear that such act was in pursuance of any term of the contract. The judgment of the majority appears therefore to be the one more in harmony with the authorities. The case is

distinguishable from *Ogle v. Atkinson* in this, that it is there stated by the consignors that the captain of the ship, which was the plaintiff's own, received the goods on behalf of the plaintiff, and as being the plaintiff's own goods. In *Garbaron v. Kreeft* on the other hand it does not appear that there was any express understanding on the part of the captain as to the purpose of the shipment.

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In *Ogg v. Shuter*, the Court of Appeal (Nov. 23, 1875, 1 C. P. D. 47, 50) laid down the following principle as to the nature and extent of the right which has been called the *jus disponendi*:—  
“We think this much is clear, that where the shipper takes and keeps in own on his agent's hands a bill of lading in this form (*i.e.*, deliverable to his own order) to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession until those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default.” Where the bill of lading has been dealt with by the vendor merely to secure the contract price (as where he sends forward the bill of lading with a bill of exchange attached with directions that the bill of lading is not to be delivered to the purchaser until acceptance or payment of the bill of exchange), then upon payment or tender by the purchaser of the contract price, there is a performance of the condition subject to which the appropriation is made, and the property does upon such payment or tender pass to the purchaser (*Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. D. 164, C. A.).

*Mirabita v.  
Imperial  
Ottoman Bank.*

The points decided by the cases above referred to in regard to the transfer of property on shipment of goods may be shortly stated as follows:—

Summary of  
principles  
relating to  
shipment  
of goods.

1. The determining circumstance is the intention of the shipper: the critical epoch is the completion of the act of

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shipment by the shipper obtaining the captain's signature to the bill of lading. This principle runs through all the above cases, and is further illustrated by the case of *Falke v. Fletcher*, 18 C. B. (N. S.) 400.

2. The intention may be to create a conditional appropriation of the goods shipped, to the fulfilment of the order or contract, and a conditional transfer of the property and right of possession in the same goods, and this intention, if expressed in accordance with mercantile usage, will receive effect (*Shepherd v. Harrison*; *Ogg v. Shuter*; *Mirabita v. Imperial Ottoman Bank*).

3. The intention of the contract or order under which the shipment takes place is important not only to show the authority for the shipper's acts, but also to assist in inferring the intention of those acts (*The Constantia*; *Wilmsdorf v. Bouke*; *Brown v. Hare*; *Moakes v. Nicolson*). The contract is, however, not conclusive, as the shipper may have intended to break it, and in that case, if he is not divested independently of the shipment, the shipment will not divest him (*Ellenshaw v. Magniac*; *Brandt v. Boulby*; *Wait v. Baker*; *Garbaron v. Kreeft*.)

4. *Prima facie* the intention of the shipper in delivering the goods on board is that they should be carried by the captain as bailee for the person indicated by the bill of lading: and this whether the ship is a general ship, a ship chartered by the consignee; or even the consignee's own ship (*Wait v. Baker*; *Moakes v. Nicolson*; *Turner v. Liverpool Dock Co.*; *Garbaron v. Kreeft*).

5. If however the shipper of goods from abroad takes the bill of lading to his own order; or (what is practically the same thing) to *blank* order, and immediately endorses and sends it to the consignee, it is presumed, if consistent with the contract and other circumstances, that he intended the same thing as if he had taken the bill of lading in the name of the consignee at once (*Walley v. Montgomery*; *Van Casteel v. Bowker*; *Brown v. Hare*).

6. If A. (the shipper from abroad) having executed an order of B. (a merchant in this country) for the purchase of goods takes the bill of lading to shipper's order, and sends it indorsed to *his own agent* in this country, and the latter sends it to B.



in a letter enclosing a bill of exchange, and requesting that the same be returned accepted; the presumption, founded on mercantile usage, is that the acceptance of the bill of exchange is a condition precedent to the vesting in B. of the right of property and possession under the bill of lading (*Shepherd v. Harrison*; *Ogg v. Shuter*).

7. But no such presumption arises from a request by the foreign merchant to the protection of his drafts in a letter sent direct to the merchant on whose orders the goods were purchased, and enclosing the bill of lading indorsed or unindorsed (*Coxe v. Harden*; *Kay v. Cotesworth*; *Exp. Banner, re Tappenbeck*, 24 W. R. 476); unless the latter expressly refers to an *indorsed* bill of lading sent to his own agent (*Brandt v. Boulby*).

8. The foreign shipper may also create a special property in the goods by taking the bill of lading in his own name, and endorsing it to a purchaser of a bill of exchange for the price; and this appears to be adopted at New Orleans as the mode by which the merchant there protects himself in making purchases with his own money upon orders from abroad (*Jenkyns v. Brown*).

9. Where buyer and seller are both in this country, the presumption of an intention to transfer the property unconditionally, arising from the seller sending the bill of lading direct to the buyer, is easily rebutted by evidence of circumstances showing that the intention was to transfer the property subject only to a condition precedent (*Moakes v. Nicolson*). And the bill of lading taken in the consignees' name but not delivered creates no presumption of an intention to transfer the property unconditionally (*Sheridan v. New Quay Co.*, 4 C. B. N. S. 618).

10. If the bill of lading is taken in the shipper's name for a collateral purpose not inconsistent with the intention to pass the property at once; and the intention at once to pass the property pursuant to the contract is clearly shown, the *prima facie* intention as appearing from the bill of lading will be overcome (*Joyce v. Swan*).

The effect of a contract to purchase a "cargo" of goods of a certain description *to be shipped* on board a certain vessel, was

Purchase of  
a "cargo."

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*Anderson v.  
Morice.*

very fully considered in the case of *Anderson v. Morice*, where an appeal to the House of Lords, through an equal division of opinion amongst the Law Peers, resulted in the affirmance of a decision of the Court of Exchequer Chamber (reversing the decision of the Court of Common Pleas), to the effect that the plaintiff, who was the purchaser under the contract, had no insurable interest in the cargo.

The case is reported, L. R. 10 C. P. 58, 609 ; and 1 App. Ca. 713. The contract, which was dated 2nd February, 1871, and signed by brokers, was, as follows :—

“Bought for acct. of Messrs. Anderson & Co. (the plaintiff's firm), of Messrs. B. & Co., the cargo of new crop Rangoon rice per *Sunbeam*, 710 register, No. 6254 in Veritas, at 9s. 1½d per cwt. cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April, 1871. Payment by seller's draft on purchase of six months' sight, with documents attached. Brokerage ½ per cent.”

On the 3rd of February the plaintiff effected insurance with the defendant, “at and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the 1st of April, on rice, as interest may appear : amount of invoice to be deemed the value : average payable on every 500 bags.”

The *Sunbeam* arrived at Rangoon, in ballast, on the 3rd of March, and, on the 6th, began to load with rice. On the 30th of March, there being 8878 bags of rice already on board, and the remainder of the intended cargo, consisting of about 400 bags more, having been taken alongside in lighters, she filled and sunk. Subsequently the captain signed bills of lading in respect of the rice which had been actually placed on board. Messrs. B. & Co. drew bills of exchange for the price mentioned in the bills of lading which were accepted and paid by the plaintiff after he had notice of the sinking of the vessel and the rice.

An action having been brought by the plaintiff against the underwriters, upon the policy, the question was whether the plaintiff had an insurable interest in the rice on board.

The Court of Common Pleas, consisting of Coleridge, C.J.,

Brett and Denman, JJ., gave judgment to the effect that, although by the terms of the contract the plaintiff purchased and therefore undertook to accept "the cargo per *Sunbeam*," and was entitled to reject a part cargo if offered him; yet the purchaser might have elected to treat what was on board as a cargo, and have insisted upon its actual delivery: and that such right gave the purchaser an insurable interest in the rice actually on board. "From the fact," they say, "of the ship being designated in the contract, and thereby agreed by both buyers and sellers to be the recipient of the rice to be appropriated to the contract, we are of opinion that there was such an appropriation of the rice on board to the contract as to prevent the sellers from withdrawing that rice without the consent of the buyer. We think that the executory contract as to any rice had become, as to the rice which was on board, a contract attaching to that specific rice. We agree that that does not determine the question whether the property in the rice had passed to the purchaser. Although the plaintiff could not have been forced, if the ship had sailed and arrived with only so much of a full cargo on board as was shipped and lost, to accept so much as was on board, yet we are of opinion that he would have had the legal option of requiring actual delivery of it. The sellers could not have withdrawn what was on board without breaking their contract with the plaintiff. They could not, if the ship had arrived, have defended an action for non-delivery on demand, by saying that they were not bound to deliver what had arrived on board the *Sunbeam*, because their agents had not shipped or had been prevented from shipping an entirely full cargo. The purchasers might have elected to treat what was on board as a cargo, and have insisted upon its actual delivery."

On appeal to the Exchequer Chamber (before Bramwell, B., Blackburn and Lush, JJ., Pollock and Amphlett, BB., and Quain, J.), the judgment of the Court of Common Pleas was reversed, all the judges, with the exception of the last named, concurring in the reversal, though on somewhat different grounds.

Mr. Justice Quain considered (chiefly on the ground that the price was to include "cost and freight," without mention of

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"insurance") that the contract was to be construed as implying a special term that the rice was to be at the risk of the purchaser as soon as placed on board. He does not however appear to have thought that the property in any portion of the rice had passed, nor does he appear to have agreed with the theory of the Court below as to a specific appropriation of the bags on board.

Blackburn and Lush, JJ., who delivered a joint decision, stated that all the judges agreed in thinking it was the plain intention of the parties to the contract, that from the time the lading was complete, at least, the rice was to be at the risk of Anderson, and that it was not material to consider whether he would have had the full property before the drafts were accepted. "But," they continued, "there remains the disputed question whether each separate bag was at the risk of Anderson from the time it was put on board the *Sunbeam*, or whether it remained at the risk of the seller until the whole intended loading was complete, and the shipping documents were ready, or at least everything was done to enable them to make out the shipping documents? This, we think, depends entirely on the intention of the parties to the contract, as appearing from it." Then after observing that it was quite competent for parties to make special terms as to the passing of the risk, whether a condition precedent for payment being made, or for the passing of the property, had been fulfilled or not, they cite the passage above quoted (p. 229, *supra*) from Blackburn as to the presumption of intention with regard to transference of the property: and they continue:—"Now the completing the lading so that the shipping documents could be made out seems to us a thing to be done by the vendor for the purpose of putting the goods into a deliverable state, or, to substitute the language of Sir C. Cresswell,<sup>1</sup> an act to be done by the seller for the benefit of the buyer, to place the goods in a state to be delivered, and, therefore, "until he has done it the property does not pass." They accordingly held the *prima facie* rule of construction to be that the parties intended that the risk should become that of the buyer, Anderson, when, at

<sup>1</sup> Referring presumably to *Gilmore v. Supple*, 11 Moo. P. C. p. 551.

not until, the whole lading was complete, so as to enable the shippers by getting the shipping documents, to call on the buyer to accept and pay for the cargo; and they held that there was nothing in this contract to rebut the presumption that such was the intention. They proceed to discuss the proposition of the Court below that the putting the bags of rice on board the *Sunbeam* "was such an appropriation of the rice on board to the contract as to prevent the sellers from withdrawing that rice without the consent of the buyer," and they show that the proposition involves reasoning in a circle. If it was the intention that a bag once placed on board should not be removed without the consent of the buyer, it was the intention that the placing on board should be an appropriation and *vice versa*. They then discuss the application of *Sparkes v. Marshall* and show very clearly the distinction between the cases. They point out that the judgment in that case proceeded on the ground that the letter mentioning the particular vessel by which the shipment was being made (a shipment which was in due course completed before the letter was acted on) was an appropriation by the seller, assented to by the buyer (by his instructing his agent to effect the insurance); and in regard to the short shipment and misrepresentation as to the port of destination, they observe,—“It may be, though it is not quite clear, and the Court did not determine it, that these facts gave Sparkes a right to undo the appropriation to him and to divest the interest already vested in him, but he never did so. The decision we think involves the position that the underwriters had no right to call upon Sparkes to exercise, for their benefit after the loss, his right, if he had it, to undo and divest an interest vested in him before the loss. But this is a very different proposition from saying that the assured had a right, after the loss, to vest in himself a right not vested in him before the loss, and so to incur a liability to pay at the underwriter's expense. We do not think he could do so.”

The judgment concurred in jointly by Bramwell, Pollock, and Amphlett, BB., though less elaborate in argument was practically to the same effect. “By the contract,” they say, “between the plaintiff and the sellers of the rice, the plaintiff was to have the cargo of the *Sunbeam*, and pay for it by

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acceptances at six months with the bills of lading attached. It is manifest, therefore, that until the cargo was completed, and the bills of lading could be given, the plaintiff, by the mere bare words of the contract, was not liable for its price, and had no property in any part of it that might be on board, except contingently on the cargo being completed. The cargo never was completed. But it was suggested that as the completion of the cargo became impossible through no default of the seller, there arose by implication a right on their part, not expressed by the mere bare words of the contract, to be paid by the buyer for so much as had been loaded. For this contention we see no ground in reason or principle. The plaintiff also was in no default, and there is no reason why the loss of the goods in which he certainly had no property but for the loss, should fall on him."

On the appeal in the House of Lords, Lords Chelmsford and Hatherley gave their opinions in favour of affirming the decision of the Exchequer Chamber. Lords O'Hagan and Selborne gave opinions to the contrary, Lord O'Hagan on the ground taken by the Court of Common Pleas, and Lord Selborne on similar grounds to those stated in the opinion of Mr. Justice Quin. The result was that the opinions of the Law Peers being equally divided, the judgment of the Exchequer Chamber stood affirmed.

It may be mentioned that Lord O'Hagan's opinion was influenced by the circumstance that the *Sunbeam* had been chartered by the plaintiff, and thought "that the partial delivery to the plaintiff in a vessel which the contract had made, *pro hac vice*, the sole recipient of his cargo, may be taken to have passed the property in the portion so delivered." In support of this view he cited the cases of *Aldridge v. Johnson*, 7 E. & E. 885, where the purchaser having bought a quantity out of a heap of barley was to send sacks for it, which the vendor was to fill and send off; and where—sacks having been sent for a part, and those filled and sent off—it was held that the property vested in the part which had been put in the sacks: and also the similar case of *Langton v. Higgins*, 4 H. & N. 402, where oil of peppermint, part of a crop bought, was put into bottles sent by the purchaser. The analogy however cannot

be stated without begging the question. The ship was sent to receive the cargo according to the contract; and the question is whether the act of putting a particular bag on board is an act in fulfilment of the contract and authorised by the purchaser, or a mere act by the seller in preparation for fulfilling the contract. The effect of the decision of the Exchequer Chamber is to hold the act to be one of the latter category. On the whole, I venture to think the weight of argument, as well as of numbers, is on the side of the decision which ultimately stood affirmed.

Another class of cases which deserve separate consideration is that of a contract for building a ship. Shipbuilding contracts.

It is usual in such contracts to stipulate for the payment of the price by instalments payable at certain stages in the advancement of the work, and also that the building is to be done under the superintendence of the purchaser's agent; and it was laid down as law in *Woods v. Russell* (5 B. & Ald. 943, 946) that where such stipulations were made, the payment of the instalments had the effect of specifically appropriating to the buyer the ship in progress under the contract, subject to the vendor's lien for the remaining instalments. The subsequent cases of *Clarke v. Spence* (4 A. & E. 448), and *Wood v. Bell* (5 E. & B. 772, 6 E. & B. 355), were decided on this principle. All the cases proceed on the principle that the whole question is, what was the intention of parties; and these stipulations were held to give rise to a presumption that the property was intended to pass. It is however much the more convenient course that the passing of the *property* should be expressly stipulated for, and it is now very commonly expressly stipulated in such contracts that the ship during the progress of the work, and the materials (so soon as they are identifiable) whether fitted into the ship or not, shall be the property of the purchaser.

In the absence of such an express stipulation as last mentioned, the question of property in the *materials* was somewhat difficult. In *Woods v. Russell* (5 B. & Ald. 943) it was decided that the property in a rudder and cordage which had been bought for the ship, had passed to the purchaser as part of the ship. In *Wood v. Bell* (5 E. & B. 772, 6 E. & B. 355) the question was

considered with regard to a variety of things and materials belonging to or destined for the ship. In the judgment of the Exchequer Chamber delivered by Jervis, C.J., as reported in the Law Journal (which appears the more complete report) the criterion is laid down as follows:—The contract is for the purchase of a ship, not for the purchase of everything in use for the making of a ship. I agree that those things which have been fitted to and formed part of the ship would pass even though at the moment they were not attached to the vessel, but I do not think that those things which had been merely bought for the ship and intended for it would pass to the plaintiff. Nothing that has not gone through the ordeal of being approved as part of the ship passes in my opinion under the contract." According to this decision, the judgment in *Woods v. Russell* as to the rudder and cordage could only be supported, if at all, on the ground of facts which do not appear in the report. The vessel was launched within a few days, and it is not improbable that there were circumstances showing that the rudder and cordage had become part of the ship. But the mere destination is not sufficient without a special term in the contract that the property in materials is to be in the purchaser. The judgment on this point in *Wood v. Bell*, is in accordance with *Ex parte Astbury, Tripp v. Armitage*, and the other cases as to chattels forming part of the soil referred to at p. 8, *supra*. In regard to materials intended for the ship, the question, assuming the property in the ship to have passed, is precisely the same as it would be in regard to chattels in connection with a contract for building or executing works upon land, such as a contract for constructing a railway, &c.

#### SECTION III.—OTHER QUESTIONS OF CONSTRUCTION AND EFFECT GOING TO THE ESSENCE OF THE CONTRACT.

Among the various other questions which may arise touching the construction and effect of contracts of sale, I here confine myself to those which go to the essence of the contract; that is to say, those which relate to the primary objects of the contract as a contract of sale.

Concurrent  
conditions.

To explain the bearing of several of the cases to be here



commented on, I must anticipate certain points as to the obligations arising out of the contract of sale, and breaches of the contract.

In every contract, where the consideration for the promise made by the one party (A.) is a promise by the other (B.) it is a condition precedent to the right of A. to exact performance, that B. has performed, if the time for performance is past,—is ready and willing to perform, if the times for performance are concurrent,—or is willing to perform and not incapacitated from performing, if the time for performance is future,—the promise on his part. It becomes therefore important, in many cases, to consider whether, upon a true construction of the contract, the promise by B. goes to the whole consideration for the promise by A. ; or to speak more accurately, whether A. in making the promise he did, is to be presumed, as to every part of what he undertakes, to have relied upon the performance by B. of his whole promise. For instance, in the case of a simple sale for cash of goods to be immediately delivered, the delivery of the entire parcel on the one side, and the payment of the whole price on the other, are *concurrent conditions*. Either would be presumed to rely upon the delivery of the whole, or the payment of the whole price (as the case may be), as the consideration for the whole and for every part of the undertaking to be performed on his part ; and neither can exact performance from the other without offering to deliver the whole of the goods or to pay the price (as the case may be), on his own part. For a more complete exposition of the subject of concurrent conditions and the authorities bearing on it, I refer to Sir E. V. Williams' notes to *Pordage v. Cole*, 1 Wms. Saund. 319 n., and the notes to *Cutter v. Powell*, 2 Sm. L. C. 1. As instances of concurrent conditions in contracts relating to the sale of goods I refer to *Atkinson v. Smith*, 14 M. & W. 695 ; *Withers v. Reynolds*, 2 B. & Ad. 882 ; *Bankart v. Bowers*, L. R. 1 C. P. 484.

If one of the parties absolutely refuses to perform his promise (being a promise going to the whole consideration), or, which is the same thing, by his conduct incapacitates himself from performing it, he gives the other a right of action without any further obligation to perform his own part of the contract.

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For instances may be mentioned the cases of *Bowdell v. Parsons* (10 East, 359), where a person having agreed to deliver specific goods to the plaintiff, delivers them to another; and *Short v. Stone* (8 Q. B. 358), where a person having agreed to marry the plaintiff has married another.

And if a promisor, in the like case, although the time for performance of his promise has not arrived, unequivocally intimates his intention not to perform his promise, the promisee has two courses open to him. He may if he pleases treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract if so advised (notwithstanding his previous repudiation of it), but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such an action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject however to any abatement in respect of any circumstances which may have afforded him the means of mitigating his loss (*Frost v. Knight*, L. R. 7 Ex. 111; affirming the principle of *Hochster v. De la Tour*, 2 E. & B. 678).

Delivery,  
receipt, and  
acceptance.

It has been already indicated (p. 226, *ante*), and will be further explained in the sequel (p. 329, *post*), that the property which is transferred by the immediate operation of the contract is not, speaking generally, immediately accompanied by complete possession. Whether the transaction is a bargain and sale or merely an executory contract, some acts generally remain necessary to give full effect to the intended transfer of property, by placing the goods into the possession of the buyer and out of that of the seller. I shall have occasion in the sequel to analyse more fully the word *possession*. In the mean

time I speak of such a change of possession as the law requires for a complete *performance* of the obligations expressed or implied, in the contract. The acts necessary for this are delivery by the seller, and receipt and acceptance by the buyer. The obligation to deliver on the one hand and to receive and accept on the other are always concurrent conditions.

The word "delivery," though expressing the act of the seller, Tender. implies the fact that the buyer receives the goods. If the buyer does not receive them, the act of the vendor in doing what is deemed by law sufficient in that respect for performance of the contract on his part, is termed a *tender*.

In the absence of express agreement it is not implied that the vendor is to send or carry the goods to the vendee. It is sufficient that he have the goods so disposed that the vendee shall have the right of access to and control over them (*Salter v. Woollams*, 2 M. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34; *Wood v. Tassell*, 6 Q. B. 234). But to make this a good tender of the goods, they must be placed at the buyer's disposal in a manner so as to be open to his inspection, and it is not enough, even as a tender of goods sold in *specie*, that the vendor offer to permit the buyer to take away closed packages alleged to contain them (*Isherwood v. Whitmore*, 11 M. & W. 347). And to make a good tender of goods sold in *genere* there must be an opportunity given of examination to see whether they correspond with the contract (*Startup v. McDonald*, 6 M. & G. 593, 624; *Toulmin v. Hedley*, 2 C. & K. 157). In the ordinary case of goods in a warehouse, assuming that opportunity of inspection has been duly allowed (*Lorymer v. Smith*, 1 B. & C. 1), the handing over of a delivery order giving the buyer the immediate right to require the warehouse keeper to attorn to him in respect of the goods is a sufficient performance by the vendor of his part of the contract. And although the goods are not described in the delivery order in the same terms as in the contract of sale, yet if the goods intended by the order, according to the usage of warehouse keepers who issue such documents, are in fact goods answering the description of the goods sold, the contract is performed by handing over the order (*Moore v. Campbell*, 10 Ex. 323).

Seller's obligation as to delivery, where not expressly mentioned in the contract.

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When contract  
express that  
seller is to  
deliver.

If the contract is express that the seller is to deliver the goods, this is construed to mean that he is to carry or send the goods; but if he places them in the hands of a common carrier to carry them to the buyer, this is, in the ordinary case, a delivery within the meaning of the contract, the carrier being, in such a case considered as the agent of the buyer and not of the seller (*Ellis v. Hunt*, 3 T. R. 464, 469; *Dawes v. Peck*, 8 T. R. 330; *Wait v. Baker*, 2 Ex. 1, 7; *Dunlop v. Lambert*, 6 Cl. & Fin. 600, 620). The vendor must, however, in such a case take the ordinary precautions to make the carrier responsible, *e.g.*, by declaring, where necessary, the value of the goods (*Clarke v. Hutchins*, 14 East, 475). If the vendor, however, expressly agrees to deliver at a certain place, he will be assumed to undertake the risks of carriage to that place, and a carrier taking the goods on the way to that place would be presumed to be his agent, and not the buyer's (*Dunlop v. Lambert*, 6 Cl. & Fin. 600).

Time allowed  
by contract for  
delivery, &c.

If a certain time is allowed by the contract for delivery or payment this must be computed exclusively of the day of the contract; so that where a contract was made on the 5th of October for sale of goods "to be paid for in two months" a writ issued on the 5th of December in an action for payment was held to be premature (*Webb v. Fairmaner*, 3 M. & W. 473).

The effect of a tender to the buyer, of bulky merchandise under a contract of sale at a late hour on the last day was very fully considered in the Exchequer Chamber on appeal from the Common Pleas in the case of *Startup v. McDonald* (6 M. & G. 593). The facts on which the decision was based were found in the form of a special verdict, that the plaintiff at half-past eight on the evening of Saturday (the last day) tendered the goods, which consisted of a quantity of oil, to the defendant: that there was time for the defendant before twelve o'clock at night to examine and weigh and to receive into his premises the whole of the oil: and that the defendant refused to receive it, alleging that the hour was late and unreasonable. They further found that the hour was by reason of its lateness an unreasonable and improper time of that day for the tender and

delivery of the oil. From the judgments delivered it appears that the majority of the Court construed this verdict as meaning that the defendant's place of business was open and that he was found there at the hour in question; that a tender was then and there made of the oil; and that having regard to the appliances and assistance available there at that hour, it was practicable for the defendant to examine weigh and receive all the oil before twelve o'clock at night. They held that under these circumstances the tender was good; and that the reasonableness of the hour, in any other sense than its being early enough to make the delivery practicable as above mentioned, was not material. Lord Abinger, C.J., differed from the opinion of the majority, holding in effect that the facts found were not such as to lead with sufficient certainty to the inference that the delivery at that hour was really practicable.

As to particular periods of time a "month" both by mercantile usage (*Reg. v. Chawton*, 1 Q. B. 247, 250; *Webb v. Fairmaner*, 3 M. & W. 473) and by statute (13 Vict. c. 21, s. 4) means "calendar month." And a specified number of days mean, as a rule, consecutive days including Sunday (*Brown v. Johnson*, 10 M. & W. 331).

Where the contract is to deliver, but nothing is said about time, a reasonable time is implied (*Ellis v. Thomson*, 3 M. & W. 445).

Where the contract was to deliver the goods "forthwith" and payment to be in fourteen days, it was held that the delivery was to be a condition precedent to the right to demand payment (*Stainton v. Wood*, 16 Q. B. 638). "Forthwith" is however a word to be construed according to circumstances, and may mean a reasonable time (*Roberts v. Brett*, 11 H. L. C. 33). Similarly the expression "as soon as possible" has been construed with reference to the ability of the seller as presumable under the circumstances (*Attwood v. Emery*, 1 C. B. N. S. 110, and compare *Hydraulic, &c., Co. v. M'Haffie*, 4 Q. B. D. 670). In the former case the delay was owing merely to other orders on hand, which might be reasonably presumed as in contemplation of both parties. In the latter it was owing to the seller being without an essential workman competent for the job,

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which the buyer did not and could not be reasonably supposed to know or contemplate.

Buyer's obligations to receive and accept.

The obligations of the buyer to receive and accept are, assuming all conditions precedent to have been performed on the part of the seller, correlative with the obligations of the seller to deliver. If the contract is silent about delivery it is incumbent on the buyer to send for and take away the goods. This he must do within a reasonable time after request by the seller; or in the absence of such request, at any time, delay on his part being in that case no excuse to the seller if the goods are not forthcoming (*Greaves v. Ashlin*, 3 Camp. 426; *Jones v. Gibbons*, 8 Ex. 920). If the seller is by the contract expressly bound to deliver the buyer is bound to receive and accept upon tender or delivery being made according to the seller's obligations as above explained.

Obligation of buyer to pay price.

Where nothing is said in the contract as to the time and manner of payment, the obligation implied on the part of the buyer is to pay the price in cash immediately, if the sale is a bargain and sale of specific goods; the seller being ready and willing to deliver them, or (if the goods have perished since the sale) without such fault as he would be accountable for as involuntary bailee. If the sale is executory and nothing said about delivery, it is implied that payment is to be made as soon as the goods are appropriated and ready for delivery; and if payment is to be made on delivery then it is due as soon as the goods are delivered or tendered.

Where payment is to be made by bill or other negotiable security, the giving of the bill immediately operates as a payment, but that operation is (except under very special circumstances or terms of contract) *defeasible* in the event of the bill or other security being dishonoured at maturity.

No performance by sending larger or smaller quantity, &c.

A vendor does not comply with his contract to sell and deliver goods by a tender or delivery of a larger or smaller quantity than that contracted for (*Hart v. Mills*, 15 M. & W. 85; *Cunliffe v. Harrison*, 6 Ex. 903; *Waddington v. Oliver*, 2 B. & P. N. R. 61): nor by sending the goods mixed up with

goods of a different description (*Nicolson v. Bradfield Union*, L. R. 1 Q. B. 620) ; nor even by sending goods which, although distinguishable, are packed up with other goods which the buyer is under no obligation to receive (*Morgan v. Gath*, 3 H. & C. 748, and in the Ex. Ch. 28 L. J. Q. B. 319).

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Where there is a written contract comprising several parcels of goods, the presumption of intention is that each part of the order is dependent on the other, so that the contract is construed as one and indivisible (*Elliot v. Thomas*, 3 M. & W. 170). And so when several orders are given verbally to a tradesman at one time the presumption is that there is only one contract (*Baldey v. Parker*, 3 D. & R. 220; *Champion v. Short*, 1 Camp. 53). But at an auction, each bid on which the hammer falls, is a separate contract (*James v. Short*, 1 Stark. 426).

Several purchases made at one time, whether one contract or not.

Where there is a contract for sale of goods in terms providing for their delivery by successive deliveries and the parcels to be paid for separately, there has been much controversy on the question whether the fulfilment on the one side, so far as relates to one or more of such deliveries, goes to the whole consideration on the other side, so that the failure of the seller or buyer to fulfil his part in respect of one or more of such deliveries absolves the other party from the duty of tendering, or accepting and paying for, the goods to be comprised in subsequent deliveries. The authorities are conflicting and require a minute review.

Contracts for the sale of goods by successive deliveries.

Before analysing the authorities on this question I may clear the ground by observing, that if one of the parties fail in performance under such circumstances as raise the presumption that he is unwilling or unable substantially to perform his contract, there can be no doubt that the other is justified in declining further performance. So if the buyer fails to pay for one instalment under such circumstances as justify the seller in believing that he will be unable to pay for instalments to be delivered in future, the latter is justified in declining further performance (*Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15; *Ex parte Chalmers, in re Edwards*,

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L. R. 8 Ch. 289). This is however not the *ratio decidendi* of the cases now to be analysed.

*Hoare v. Rennie.*

In *Hoare v. Rennie* (5 H. & N. 19), the defendants had agreed to buy from the plaintiffs 667 tons of iron to be shipped from Sweden in the months of June, July, August, and September, and in about equal portions each month. In June (as it is stated in the plea which was demurred to) the plaintiffs shipped twenty-two tons only, and the defendants having ascertained that no more had been shipped in that month, gave notice that they would not accept the twenty-two tons or any further shipments. It was held, on demurrer to the defendants' plea, that the breach at the outset on the part of the plaintiffs in failing to make the proper shipments in June, was well pleaded in bar to their recovering in the action.

*Jonassohn v. Young.*

In *Jonassohn v. Young*, 4 B. & S. 296, there was an agreement by plaintiffs to sell to defendants as many coals of a certain description as one steam vessel to be sent by the defendants could fetch in nine months from Sunderland to London. A plea to the effect that the plaintiffs broke the contract by delivering on the first voyage a cargo of inferior coal, was successfully demurred to. The ground of judgment was that the plea only showed a breach as to part of the consideration. Crompton, J., observed, that *Hoare v. Rennie* belonged to a class of cases in which the breach alleged in the plea is an entire frustration of the contract. I have already shown that this was not the *ratio decidendi* of *Hoare v. Rennie*; although the facts in that case might have justified a decision on the ground here suggested.

*Bradford v. Williams.*

I must here in the order of time mention a case of *Bradford v. Williams*, reported L. R. 7 Ex. 259, which though not precisely in point on the question now under discussion, has been subsequently referred to (*per* Baggallay, L.J., in *Honck v. Müller*, 7 Q. B. D. 102) as a case in which the principle of *Hoare v. Rennie* was adopted. *Bradford v. Williams* was the case of a charter-party under which a coasting vessel belonging to defendants was to perform repeated voyages between certain places. After some voyages had been made under the contract, the plaintiffs in effect declined to go on for a period of a month, and the Court (on demurrer) decided that this



refusal went to the root of the contract and entitled the defendants to decline further performance.

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In *Simpson v. Crippin* (L. R. 8 Q. B. 14), the contract was that defendant should supply plaintiff with from 6000 to 8000 tons of coal to be delivered into the plaintiff's waggons at defendant's colliery in equal monthly deliveries during the period of twelve months. During the first month the plaintiff sent waggons to receive only 158 tons, and the defendants on account of this failure to take a fair proportion under the contract, gave notice that the contract was cancelled. It was held by a majority of the Court of Queen's Bench (Blackburn and Lush, JJ.) that they were not entitled to cancel the contract; Mellor, J., dissenting on the ground merely that the Court was bound by the decision of the Court of Exchequer in the case of *Hoare v. Rennie* (5 H. & N. 19), which he thought undistinguishable. In his judgment in *Simpson v. Crippin*, Blackburn, J. (L. R. 8 Q. B. 17), says:—"No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare v. Rennie* is in point, and that we ought not to go counter to the decision of a Court of co-ordinate jurisdiction. It is however difficult to understand upon what principle *Hoare v. Rennie* was decided. If the principle on which that case was decided is that wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow (the doctrine contained in the notes to) *Porduge v. Cole*, 1 Wm. Saund. 319*l*." Lush, J., also observed that he could not understand the judgments in *Hoare v. Rennie*. "The Court," he said, "must have interpreted the contract in that case as if time were of its essence; there are no words here which import such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation."

*Simpson v. Crippin.*

In *Freeth v. Burr*, L. R. (9 C. P. 208), there was a contract for the sale of 250 tons pig iron, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days

*Freeth v. Burr.*

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after delivery of each parcel. Notwithstanding repeated demands by the buyer (plaintiff) for delivery, the vendor (defendant) had only delivered 125 tons at the end of six months. This the plaintiff refused to pay for, claiming to set off the payment for loss on non-delivery of the remaining quantity; but he still urged delivery of the remainder which the defendant refused to make, contending that the plaintiff had exonerated him. The Court (Lord Coleridge, C.J., Keating and Denman, JJ.), decided in the plaintiff's favour on the ground that his refusal to pay was not an intimation of an intention altogether to refuse to perform his contract. Lord Coleridge (as Crompton, J., did in *Jonassohn v. Young*), tried to explain *Hoare v. Rennie* on the theory that the non-delivery there was considered to be evidence of an intention wholly to abandon the contract. In other words he dissented from the true ratio decidendi of *Hoare v. Rennie*.

*Brandt v.  
Lawrence.*

In *Brandt v. Lawrence* (1 Q. B. D. 344), there were two contracts, each for the purchase by defendant of 4500 qrs. (more or less) of oats "shipment by steamer or steamers during February." The plaintiff shipped, in February, on board one steamer 4501 qrs. to answer the first contract, and 1139 qrs. to answer in part the second contract. He also shipped, but too late, on board another steamer, a sufficient quantity to answer the remainder of the second contract. As a supplement to the facts as stated in the report it should be added (see *per* Cotton, L.J., in *Reuter v. Sala*, 4 C. P. D. 250) that it was a term of the contract that payment was to be made in cash on receipt of and in exchange for shipping documents. It was held by the Court of Appeal (Mellish, James, and Baggalay, L.JJ.) that the defendant was bound to accept the 1139 qrs. in part fulfilment of the second contract.

*Reuter v. Sala.*

*Reuter v. Sala*, 4 C. P. D. 239, was a decision of the Court of Appeal, in an action for damages for non-acceptance of twenty-five tons of pepper under a contract for sale of pepper by plaintiffs to defendants upon the following terms:—"Twenty-five tons (more or less) Penang black pepper, October <sup>and</sup> November shipment from Penang to London, per sailing vessel or vessels, at . . . to be landed and worked as usual at sellers' expense. The name of the vessel or vessels, marks and full particulars to be

declared by the buyer in writing within sixty days from date of bill of lading. . . . Prompt three months, for final day of landing. Deposit £20 per cent., and difference on presentation of weight notes. No discount." Within the stipulated time the plaintiffs declared three parcels of pepper, which had been all shipped by one vessel under three separate bills of lading; two of these parcels, consisting together of about twenty tons, under bills of lading dated 29th November, and the remaining parcel, about five tons, under bill of lading dated 11th December. Throughout the case, as reported, it is assumed as admitted, that the twenty tons came within the description of an October <sup>and</sup> <sub>or</sub> November shipment, but that the five tons did not. The Court of Appeal by a majority (Thesiger and Cotton, LJJ., *diss.* Brett, L.J.) decided (affirming the judgment of Coleridge, C.J.) that the defendants were not bound to take the twenty-five tons of pepper, or any part thereof.

The judgment of Coleridge, C.J., who had tried the case without a jury, was on the ground that the plaintiffs not having declared the whole of the pepper according to the contract within the stipulated time, had not fulfilled their part of the contract.

The judgment of Lord Justice Thesiger was rested on the ground that the plaintiff had tendered, or made a final election, communicated to the buyer, to appropriate the whole of the twenty-five tons as the goods to be delivered in performance of the contract.

Lord Justice Cotton's judgment rested, in effect, on the same ground as that of C.J. Coleridge. In regard to the contention that the contract was divisible by reason of the words "per vessel or vessels," he pointed out that *Brandt v. Lawrence* was distinguishable, because in that case the seller shipped in a vessel a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore under the contract a right to ask for the price in cash for this part of the entire quantity in exchange for the bill of lading. He further pointed out that the plaintiffs in the case immediately under consideration had not severed the twenty-five tons of pepper in the only way contemplated under

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the contract by shipping it in different vessels ; but shipped in one vessel twenty-five tons of which they contended the defendants were bound to take the whole.

Lord Justice Brett's judgment proceeded on the view that the appropriation of the twenty tons which were in accordance with the contract was capable of being severed from the attempted appropriation of the five tons which were not : and therefore, in his view, the question was whether, if the plaintiffs had tendered the twenty tons only, not being able to tender according to contract any five tons to make up the twenty-five tons, the defendants could have refused to accept the twenty tons. After analysing the cases of *Jonassohn v. Young*, *Simpson v. Crippin*, and *Brandt v. Lawrence*, he deduced from them (4 C. P. D. 256) the following general principle :—"Where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him ; that such a breach can be compensated in damages without any necessity for annulling the whole contract ; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part ; that the other party should have been or should be always ready, and willing, and able to accept or tender the whole."

An unreported decision of the Queen's Bench Division in *Englehart v. Bosanquet* (mentioned in the report of *Honck v. Muller*, 7 Q. B. D. 100) followed *Hoare v. Rennie*.

*Honck v. Muller.*

So standing the authorities, the case of *Honck v. Muller* came before the Court of Appeal. It was there decided on the 1st of April, 1881, and is reported, 7 Q. B. D. 92.

The action was for damages for refusing to deliver one-third 2000 tons of iron in December, 1879, and one-third of such in January, 1880, according to the terms of the following contract :—

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“ MIDDLESBOROUGH, ETC.

“Sold to J. HONCK, Esq., &c., London.

“2000 tons No. 3 G. M. B. Middlesbro’ pig iron at 42s. per ton, f.o.b. maker’s wharf here.

“Delivery November, 1879, or equally over November, December, and January next at 6*d.* per ton extra.

“Payment, net cash here against bills of lading.

“Fees, conservancy dues payable by shipper.

“Under this contract buyer and seller alike shall be free from any liability, should they be unable to receive or deliver owing to strikes or other combinations, or to accidents or such like unavoidable circumstances, and the contract shall be prolonged for a period corresponding to the duration of the interruptions arising from any of the above causes.

“(Signed) *per pro.* E. C. MÜLLER,

“T. C. DAVISON.”

The following is the material correspondence :—

“ MIDDLESBOROUGH, *November 17th*, 1879.

“JOHN HONCK, Esq., London.

“DEAR SIR,—I beg reference to contract of 27th Oct. for 2000 tons pig iron, according to which you have the faculty to take the whole in November, or one-third in each month, November, December, and January. Will you be good enough to inform me what quantity you wish to take this month over and above the minimum quantity of 666 tons due this month, and kindly send me your delivery instructions.

“I am, yours truly,

“(Signed) *per pro.* E. C. MÜLLER,

“T. C. DAVISON.”

“5, UNION COURT CHAMBERS, OLD BROAD STREET,  
LONDON, E.C., *Nov. 22nd*, 1879.

‘E. C. MÜLLER, Esq.

“DEAR SIR,—I am sorry I was out on the several

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occasions of your calling here this week, for it would have given me pleasure to have a talk. Mr. Honck asks me to say he will be obliged if you will defer shipping any of his iron until December, so allowing him to take delivery of all in December and January.

"(Signed) CALEB BLOOMER"

"MIDDLESBRO', Dec. 1, 1879.

"MR. JOHN HONCK.

"DEAR SIR,—I beg to refer you to my (letter) of 17th ult. to which I have received no reply. I have since then written several times also to your broker, Mr. Caleb Bloomer, pressing for orders for delivery of your iron, but could elicit no satisfactory reply. You ought to have taken delivery of a large portion of your iron during last month, and as you have failed to do so, I have been put in a very awkward position with regard to your whole contract; in fact, I cannot keep any contract on my books which is not executed properly. I must therefore give you notice that I have removed from my books and cancelled the contract for 2000 tons No. 3, which you had with me. I do this in order to protect myself from any further loss in the matter.

"I remain, yours truly,

"(Signed) E. C. MÜLLER"

"LONDON, 2nd Decbr., 1879.

"E. C. MÜLLER, Esq.

"DEAR SIR,—Yours to hand in due course. My reason for not replying to yours of the 17th was that Mr. Bloomer, my broker, did so; and as the end of the month drew on prices hardened; hence, the reason I did not give shipping orders. I am therefore at a loss to see your reason for saying you have cancelled my contract to prevent further loss. In fact, I will not allow such a thing to be done.

"My iron is under offer, and I expect it to be accepted; you must, therefore, accept notice that I hold you responsible for any loss in any case. You will have shipping orders in a few days.

"Yours truly,

"(Signed) JOHN HONCK."

The defendant replied to this by saying he should stand by his letter of the 1st December, and he continued to insist upon the contract being cancelled.

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The decision of the majority, Lords Justices Bramwell and Baggallay, against the dissent of Lord Justice Brett, was to the effect that the defendant was justified in his refusal (in December) to deliver any iron under the contract. Owing to the diversity of views expressed it is necessary, in order to arrive if possible at the *ratio decidendi*, to state the judgments in some detail.

Lord Justice Bramwell thought the meaning of the contract to be that the plaintiff had the option to have the 2000 tons in November, or in equal portions in November, December and January; that unless he elected in November in time to have the whole delivered in November if he so elected, or in time to have one-third delivered in November, if he elected to have the iron in three deliveries, he had no cause of action; and that he did not elect. He then went on to consider the case on the assumption (though he thought otherwise) that the plaintiff elected to have the iron in three equal quantities in November, December and January: and on this aspect of the case the grounds of his judgment are fairly represented by the following extracts:—"The case for the plaintiff is, that by the contract, or what was done under it, he was to take and was entitled to have 666⅔ tons in each of the months of November, December and January. That though he (the plaintiff) broke his contract in not taking the 666⅔ tons in November, and though the defendant at once gave notice he would not go on with the contract, he (the plaintiff) had a right to insist on the December and January deliveries. In other words, the plaintiff says, that having agreed to take 2000 tons he has a right or power to demand and take 1333⅓ and no more. I cannot think so. I think that contention is contrary to law and justice alike. I think that where no part of a contract has been performed, and one party refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him. . . . Suppose a contract to supply bread to a workhouse for a year from the 1st of January, and the contractor says he will supply and does supply none in January, can he insist on supplying in

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the other eleven months? . . . The party to a contract so broken has a right not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract, viz., what would remain to be performed if the other party had performed his part, and so enabled the performance of the whole. If, indeed, the contract has been part performed and cannot be undone, then it must be proceeded with without such power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery. . . . It is asked whether every trifling breach of contract is attended with this consequence. I know not; but 666 $\frac{2}{3}$  tons out of 2000 are not a trifle. If it must be something which goes to the "root" of the contract, as was said, surely one-third of the subject-matter does. The case of *Hoare v. Rennie* is in point. The same thing was decided a few days ago in *Englehart v. Bosanquet*. It was there held that on a sale of 2000 tons of sugar to come in two ships, when the first ship was not equal to contract, the buyer was not bound to take the other. But it is said that *Hoare v. Rennie* has been overruled by *Simpson v. Crippin*. That is not so. That decision was quite right. The case was distinguishable from *Hoare v. Rennie*, for the contract had been part performed and could not therefore be undone. . . . It has never yet been held that a man may break his contract, render the performance of the whole impossible, and though nothing had been done under it, insist on the performance of the remainder."

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Baggallay.

Lord Justice Baggallay agreed with Lord Justice Bramwell in thinking that the plaintiff was bound under the contract to make his election in November, and that not having done so he had no cause of action. He proceeded to consider the case on the assumption of the correctness of the construction contended for by the plaintiff, namely, that unless he made an election to take all in November, the contract was for the delivery in three equal portions in the three months. Upon this assumption also, he arrived at the same conclusion as Lord Justice Bramwell. "Were it not," he said, "for the authority of *Simpson v. Crippin*, which has been much pressed upon us, I should have felt no doubt as to the propriety of holding that the refusal by the



plaintiff to accept the first portion of the cargo in accordance with the provisions of the contract as construed by himself, was a sufficient justification for the defendant's refusal to deliver the remaining portions. It is to my mind impossible to reconcile the decision in *Simpson v. Crippin* with that in *Hoare v. Rennie*, except in the manner pointed out by Lord Justice Bramwell, but I do not find that the decision in *Simpson v. Crippin* was in any way rested upon the distinction pointed out by the Lord Justice. Indeed, Mr. Justice Mellor stated in his judgment that he was unable to distinguish the two cases. If, then, the decision in *Simpson v. Crippin* is to be considered as conflicting with that in *Hoare v. Rennie*, and I think it was so considered by the judges who decided it, I am bound to say, that I adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided."

The effect of Lord Justice Brett's judgment will appear from the following extracts :—" In the result, this case seems to me to be a contract for the delivery of iron at three different periods at a price per ton. The action is for non-delivery, and the question is whether the failure of the plaintiff to take the first delivery prevents him from requiring a delivery at the two successive periods. . . . Now such a contract as this in the present case, for successive deliveries of goods at a sum per measure, is a somewhat modern kind of contract, but it has now been in existence for many years. It has been frequently considered, and the rule with regard to its construction seems to me to be this, that where the deliveries are to be so made, and the price of each to be so determined, then, inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries. That is the doctrine contained in the notes to *Pordage v. Cole* (1 Wm. Saund. 319l). The courts have not laid down that doctrine as an abstract proposition of law, but they have gathered it from the course of business amongst merchants, that where merchants have so contracted by separating the price, as in case of failure of one of the deliveries, to give an adequate remedy for it, it is not their intention that such non-delivery should put an end to the

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contract, and prevent the party so failing from having a right to make subsequent deliveries. But it is suggested that if there is a failure in the first delivery, then the party against whom that failure is committed may throw up the contract. But why? Supposing at the time of the first delivery there is no difference between the market price and the contract price of the goods, the person against whom the failure is made suffers positively no loss. But at the time of the second delivery the difference between the market price and the contract price may be enormous; yet at the time of the third delivery it is said, if you have fulfilled the contract as to the first delivery, where it did not signify whether you did or not, but have failed in the second delivery, where it was of the utmost consequence, nevertheless you can insist upon the third delivery; but if you have failed in the first delivery where it was of no consequence at all, then although the question of delivery of the second and third is of the utmost consequence, your right to them is to be of no avail. It seems to me that such a conclusion is so strained that, with the greatest possible respect, I should say as matter of business it is absurd. Then is one bound to come to such a conclusion when one's duty is to apply that which would be the conduct of all reasonable merchants? It seems to me that one is not. The notes to *Pordage v. Cole* seem to me to be clear, and to make no distinction whatever as between the first delivery or any other. The case of *Simpson v. Crippin* distinctly states there is no difference with regard to the first delivery or any other. It is objected to that case that the learned judges said they did not understand the case of *Hoare v. Rennie*. It seems to me not that they meant to say they did not understand *Hoare v. Rennie*, but that they could not understand that the principle of law was rightly applied there. In other words, they meant to say they differed from *Hoare v. Rennie*. So do I, for the reasons I have given. In my opinion *Hoare v. Rennie* was wrongly decided, and I prefer *Simpson v. Crippin*; I prefer what Lord Blackburn said in that last case, viz., in such a contract as this the doctrine contained in the notes to *Pordage v. Cole* ought to be applied. With regard to the case of *Englehart v. Bosanquet*, the facts there seem to have been exactly like those in *Hoare v. Rennie*, and therefore

he judges were bound to follow that case. But in the Court of Appeal we are not bound to do so, and I prefer the doctrine laid down in *Simpson v. Crippin* by the judges, who to my mind, showed that in their opinion *Hoare v. Rennie* was wrongly decided. I think that they were right and that *Hoare v. Rennie* was wrong."

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It seems hardly possible to extract from these judgments a *ratio decidendi* which can be said to have the authority of a decision of the Court of Appeal. In Lord Justice Bramwell's judgment there are at least three distinct reasons which are more or less mixed up as the grounds upon which the defendant was entitled to throw up the contract. *First*, a *refusal* on the plaintiff's part to perform the contract so far as relates to an entire month's delivery. *Secondly*, *failure* at the outset in performance, so far as relates to the first monthly quantity, and thereupon an immediate repudiation by the defendant of the whole. *Thirdly*, failure to perform a part of the contract of such large comparative amount as to go to the root of the whole.

Analysis.

As to the first of these grounds it is difficult to gather how anything like a *refusal*, in the sense of an antecedent declaration of intention, can be gathered from the correspondence in the case. The idea of *refusal* appears founded partly on the form which the plaintiff's claim takes in the action; namely, as a claim to the two-thirds only. But that is only an admission that he is precluded by his own failure from claiming the other one-third. It may well be that an antecedent refusal to perform the contract so far as relates to a substantial part, may be regarded, at the election of the other party, as a declaration of intention to decline further performance as to the entirety remaining to be performed, so as to justify the other in throwing up the contract. And this seems to be the *ratio decidendi* of *Bradford v. Williams*. But it is difficult to see anything in the facts of the case in point raising a case of this kind.

As to the *third* of the above grounds, the reasoning of Lord Justice Brett appears to furnish a weighty argument to the contrary. The argument is in effect this:—In a contract of this kind, *non constat* that the comparative importance of the part of the contract where there has been a failure is to be

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measured by the ratio of the quantity of the stipulated instalment to the whole quantity in the contract.

The second of the above grounds is apparently the true *ratio decidendi* of *Hoare v. Rennie*; but Lord Justice Bramwell, if he considered this ground sufficient for the disposal of the case, has certainly not clearly so expressed himself.

The *ratio decidendi* of Lord Justice Baggallay's judgment is that of *Hoare v. Rennie* pure and simple: and against this, as far as opinion goes, must be set off the judgment of Lord Justice Brett, as well as of the no less weighty opinion of the judges who decided *Simpson v. Crippin*, and the criticisms of *Hoare v. Rennie* made in *Jonassohn v. Young* and *Freth v. Burr*.

Unsatisfactory  
state of the  
authorities on  
the question  
stated at p. 281,  
*supra*.

I shall only add one remark to the above necessarily long analysis. It seems to me clear that *Hoare v. Rennie* and *Simpson v. Crippin* are irreconcilable in principle. The question is that with which I started on p. 281 *supra*; a question as to the presumption of intention in a common and important type of mercantile contracts. Of this question the authorities, as they at present stand, do not, as it appears to me, afford a complete or satisfactory solution.

*De Oleaga v.*  
*West Cumber-*  
*land Iron and*  
*Steel Co.*

In *De Oleaga v. West Cumberland Iron and Steel Co.* (4 Q. B. D. 472), the plaintiffs who were merchants at Bilbao, undertook to supply the defendant at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at 25s. 6d. per ton cost, freight, and insurance, payment to be made by cash on delivery of each shipment, "deliveries to be made at the rate of from 800 to 1300 tons per month, provided we are able to procure tonnage at or under the rate of 16s. 6d. per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, &c." It was held by the Queen's Bench (Cockburn, C.J., Lush and Manisty, JJ.), that there was a material distinction between the delivery clause and the clause by which the seller exempted himself from responsibility. The effect of the former was that so long as freight ranged above the limit the seller was entitled to withhold delivery, but the contract for the quantity undelivered

remained in force; and the seller would upon freights coming down be entitled and bound to resume the monthly deliveries, and if he failed to do so the buyer would have been entitled to buy in against him and sue for the difference between the contract price and the then market price. The effect of the latter clause was to protect the seller from such liability and nothing more; and the non-delivery under the circumstances there mentioned is not a suspension of performance, but a breach; although one for which the buyer is not to hold the seller liable in damages. The result was that the seller was entitled to deliver the quantities which he withheld while freights were above the limit, but not those which he was prevented from delivering by *vis major*.

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The sale of goods "to arrive" has of late years formed an important class of mercantile contracts.

Sale of goods  
"to arrive."

Most usually a contract of this kind relates to specific goods, the shipment of which has been advised by mail steamer or telegraph.

The construction and effect of such a contract, in the usual terms, have been established by numerous cases. A sale of goods "to arrive *per*, or *ex*, *Argo*," or "on arrival *per* *Argo*," is construed to be a sale of the goods subject to a double condition precedent, viz., that the ship *Argo* arrives in port, and that when she arrives the goods are on board (*Lovat v. Hamilton*, 5 M. & W. 639; *Johnson v. McDonald*, 9 M. & W. 600; *Idle v. Thornton*, 3 Camp. 274; *Boyd v. Siffkin*, 2 Camp. 26).

When the sale was of "all the oil on board the *Thomas*, on arrival, to be delivered by the sellers with all convenient speed, but not to exceed a given day;" it was held that the arrival of the vessel with the goods in time for delivery on that day, was condition precedent, and by non-arrival (without default of the vendors) the agreement became void (*Alewyn v. Prior*, 11 Q. B. 406).

A sale of goods described as "now on passage from Singapore, and expected to arrive in London *per*, &c.," has been construed as an absolute engagement that the goods are on board, or in other words, the only condition of the contract taking effect was

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the arrival of the vessel (*Gorrissen v. Perrin*, 27 L. J. C. P. 29). So where the declaration alleged a sale of goods by sample "to be delivered by the defendant to the plaintiff on safe arrival of a certain ship called the *Countess of Elgin* then alleged to be on her passage from Calcutta to London," the construction was held to be that the sale was conditioned on the arrival of the vessel only (*Hall v. Rowson*, 4 C. B. N. S. 85).

But where a sale was in these terms,—“We have this day sold to you about 600 tons more or less, being the entire parcel of nitrate of soda expected to arrive at port of call *per Precursor* at 12s. 9d. per cwt. . . . Should any circumstance or accident prevent the shipping of the nitrate, or should the vessel be lost, the contract to be void,”—and the soda which had been purchased and intended for shipment was destroyed by an earthquake at the port of lading:—the contract was construed as referring to a particular parcel of soda, and it was held that, this parcel having been destroyed by the act of God, the proviso for avoidance of the contract took effect (*Smith v. Myers*, L. R. 5 Q. B. 429, and 7 Q. B. 139).

In sales of goods “to arrive,” if the ship is not named in the contract, but the vendor undertakes to give notice of the name as soon as known to him, this is considered as an essential term of the contract, and therefore the giving of due notice of the ship is a condition precedent to the vendor’s being entitled to sue on the contract (*Busk v. Spence*, 4 Camp. 329; *Graves v. Legg* (on demurrer), 9 Ex. 709). In the latter case, when tried on the merits, it appeared that notice was given to the broker who acted for both buyer and seller, and there was evidence that by the usage of the (Liverpool) market this notice was considered sufficient; and by the judgment of the Court of Exchequer, affirmed by the Exchequer Chamber, this was upheld as a good notice (*Greaves v. Legg*, 11 Ex. 642; 2 H. & N. 110).

Sale of a  
“cargo.”

The term “cargo,” unless there is something in the contract to give it a different signification, means the entire load of the ship which carries it. And under a contract for the sale of a cargo of from 2500 to 3000 barrels (seller’s option) petroleum; where 3000 barrels were shipped as in performance of the con-

tract, and 300 more were placed on board the vessel to make up a full cargo, and the buyer refused to accept the 3000 barrels so shipped;—it was held by the Court of Appeal (Cockburn, C.J., James and Mellish, L.JJ.), unanimously affirming the judgment of the Court of Exchequer (Kelly, C.B., Cleasby and Amphlett, BB.), that he was not bound to take them (*Borrowman v. Drayton*, 2 Ex. D. 15. See also *Kreuger v. Blanck*, L. R. 5 Ex. 179; *Vernede v. Weber*, 1 H. & N. 311; *Senior v. Braddon*, 2 C. B. N. S. 324). In *Tamvaco v. Lucas* (two cases on demurrer reported 1 E. & E. 581, 592) the sale was of a cargo of wheat to consist of "about 2000 quarters, say from 1800 to 2000 quarters," and it was decided in effect that, definite limits having been assigned to the quantity, the contract would not be fulfilled by a tender of a cargo exceeding the maximum or falling short of the minimum limit.

In *Ireland v. Livingstone* (L. R. 2 Q. B. 99; 5 Q. B. 516; 3 H. L. 395) there was an order for 500 tons cane-sugar at a certain limit as to price, to be shipped from Mauritius, "fifty tons more or less of no moment if it enables you to get a suitable vessel." The circumstances of the market in Mauritius were, as the buyer knew, such that so large a quantity as 500 tons could not be procured at once. The person receiving the order accordingly bought in small quantities until he had bought 400 tons, when the market having risen above the price named as the limit he shipped that quantity and no more. There was much difference of opinion in the Courts as to the meaning of the order, having regard to the circumstances; and the ultimate decision of the House of Lords was that the parties being in the relation of principal and agent, and the agent in carrying out an order of doubtful meaning having *bonâ fide* adopted one of the constructions of which it was susceptible, he must be considered as between himself and the principal to be warranted in what he did.

For want of a better place, and in reference to the construction of the word "about," in a contract of sale, I here further refer to the cases of *Cross v. Eglin* (2 B. & Ad. 106); *Cockerell v. Aucompte* (2 C. B. N. S. 440); *Moore v. Campbell* (10 Ex. 323); *McConnell v. Murphy* (21 W. R. 609). In the case last mentioned the contract was for sale of "all the spars manu-

"About," &c.

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Cargo "as it  
stands."

factured, &c., say about 600." The word "say" in connection with "about" was held to indicate the intention to leave considerable latitude in the description, and a tender of 496 being all that had been manufactured was held a substantial compliance.

In the following case, the difficulty of construction arose from reference in the contract to a bill of lading not before either party at the time, and the terms of which involved an unexpected result. The sale was of a cargo on board a certain vessel "*as it stands*, consisting of about 1300 quarters . . . . corn at the price of 30s. per quarter free on board including freight and insurance to a safe port in the United Kingdom. *The quantity to be taken from the bill of lading*, and measure calculated at 220 quarters=100 kilos. Payment cash on handing shipment documents and policy of insurance, less two mo. int. from date." This was construed as having the intention to put the purchaser in place of the vendor, and that the purchaser was to pay according to the quantity named in the bill of lading whether that quantity ultimately turned out to be more or less than the quantity actually delivered (*Covas v. Bingham*, 2 E. & B. 836). The hardship of the case was that the bill of lading, while specifying a quantity largely in excess of that found on board, had been signed by the master guarding himself by the term "quantity and quality unknown," so that the purchaser was probably without any remedy for the short quantity. The terms of the bill of lading were however equally unknown to the vendor at the time.

Price "to cover  
cost, freight, and  
insurance."

In a contract for sale of goods to be shipped it is not uncommon to stipulate for a price "to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents." These terms are well understood in practice, and have been explained in a considered opinion delivered by Blackburn, J. (concurring in by Hannen, J.), in answer to questions of the House of Lords in the case of *Ireland v. Livingstone* (L. R. 5 H. L. Ap. 406). This explanation, so far as it relates to a simple transaction of sale, is as follows:—"The terms at a price 'to cover cost, freight and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are



perfectly well understood in practice. The invoice is made out debiting the consignor with the agreed price, and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee, which he is bound to accept (if the shipment be in conformity with his contract), on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. . . . If freight is high, the consignor (being the vendor) gets the less for the goods he supplies; if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price, he is bound to do so, though, owing to the rise in prices at the port of shipment, making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out a bad one. On the other hand, if owing to the fall in prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged." The opinion then goes on to state the effect of an order in these terms, where the relation

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is that of principal and agent, and in this relation will be reverted to in the part of this work on *agency*.

Sale of goods by  
description.

Where there is a sale of goods *by description*—that is to say, where either goods *in genere* are sold under a certain description, or where the sale is of specific goods whose character is presumably only known to the buyer by the description under which they are sold to him (*e.g.*, bales of goods specified by marks in a bill of lading and described in the contract as being of a certain kind);—it is of the essence of the contract that the goods furnished shall agree with the description.

Examples.

The following may be mentioned as cases illustrating the principle. In *Tye v. Fenmore* (3 Camp. 462), the article sold was described in the sale note as “fair merchantable sassafras wood,” which was proved to mean in the trade the roots of the sassafras tree. The article tendered not being of this description, but timber of the tree, Lord Ellenborough held that it was not enough for the plaintiff to prove that the word corresponded with a specimen exhibited before the sale, and that it was immaterial to show that the defendant was a druggist and skilled in the nature of medicinal woods. In *Powell v. Horton*, 2 Bing. N. C. 668, where goods were sold under the description “Scott & Co. 75 barrels mess pork,” it was held of the essence of the contract that the article should be of the manufacture or brand of “Scott & Co.” In *Barr v. Gibson* (3 M. & W. 390), the subject of the sale was a “ship,” then on a voyage. At the time of the sale the ship had run aground, and there was evidence to show that the fabric of the vessel was at the time sound, and if the appliances had been at hand (which they were not) she might have got off and floated. The state of things was, however, such that the vessel would, in a question of insurance, have been considered totally lost. It was held that to make the sale valid it was necessary that the subject-matter should come within the description of “a ship,” and that if it had been a *mere wreck*, or bundle of timber and cordage, there would have been no contract; but the inference drawn by the Court from the facts was that the subject-matter was a ship, and that the contract was therefore binding. In *Gosling v. King-*

*ford* (13 C. B. N. S. 447), the article sold was described in the contract as "oxalic acid," and it was held essential that the thing tendered should be such as, in a mercantile sense, to pass under that name. And although, before making the contract, the purchaser had seen the bulk of the goods which he believed he was bargaining for, yet, on the stuff being found by chemical analysis to be so impure as not to be "oxalic acid" in a mercantile sense of the term, the purchaser was held not bound to take it.

The case of *Hopkins v. Hitchcock* (14 C. B. N. S. 65), where an order for iron, described as "S. & H. Crown," was satisfied by delivery of iron marked "H. & Co.," is not in conflict with any of the cases immediately above cited. It appeared in evidence that S. & H., who were in the habit of stamping their iron with a crown, had transferred their business to H. & Co., who disused the crown mark and stamped their iron "H. & Co." The jury found the variation in mark immaterial. This is merely a case where parol evidence was admitted to explain a description not applying in its exact terms to any goods known in the market.

On the other hand where goods, open to inspection in bulk before the sale, were sold by auction upon conditions that the lots were to be taken away by the purchasers "with all faults, imperfections, or errors of description," by a certain day, and payment to be made *before delivery*, the catalogue also stating that the goods had been measured to the yard's end; it was held that a purchaser at the sale was not entitled to measure the goods before taking them away and paying for them (*Pettitt v. Mitchell*, 4 M. & G. 819). The contract was, in effect, construed as a sale of the identical goods; and the description in the catalogue of the goods as being of certain lengths, with the statement that they had been fully measured, did not make it a sale *by description*, but amounted merely to a representation or warranty that the goods were of the lengths described, giving a claim for an allowance for deficient quantity if a deficiency should be afterwards ascertained.

In some of the cases above referred to, and in many others, there is a confusion of language by the introduction of the word "warranty," which in its strict and technical sense, as applied to

Distinguished  
from warranty  
properly  
so called.

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contracts of sale, denotes a stipulation as to quality *collateral* to the primary object of the bargain. This is well pointed out by Lord Abinger in *Chanter v. Hopkins* (4 M. & W. 399, 404):—  
“If a man offers to buy peas of another and he sends him beans, he does not perform his contract, but that is not a ‘warranty,’ there is no *warranty* that he should sell him peas, the contract is to sell peas, and if he sell him anything else in their stead, it is a non-performance of it.” Probably this confusion of language is explained by the circumstance that in many cases the only question to be decided is whether or not the stipulation as to description is binding, the goods in the mean time having been so disposed of (by arrangement or otherwise) as to render it immaterial whether the stipulation is *of the essence* of the contract or merely *collateral*. Possibly the confusion is also due to the circumstance that, as I shall show presently in regard to sales by sample, the buyer may elect to take the goods tendered and treat the description as a warranty.

The principle above stated in regard to a sale of goods by *description* applies, although to the description is added some words providing for a latitude as to the *quality* of the goods to be supplied. Thus, an agreement for sale of “foreign refined rape oil warranted only equal to samples” was held not complied with by tender of oil which was not “foreign refined rape oil,” although equal to the quality of the sample (*Nichol v. Godts*, 10 Ex. 191).

*Allen v. Lake.*

In *Allen v. Lake* (18 Q. B. 560), the sale was of turnip seed described on the face of the sold note as “fourteen quarters of Skirvings Swedes.” There was evidence that the seed was of the identical crop which the plaintiff had seen in bloom and verbally agreed to buy; but after the seed was sown and the plants came up he discovered that the seed was of a different and inferior sort from Skirvings Swedes. The action was brought by the purchaser, and the subject-matter having been necessarily destroyed before the discovery was made, it was of course indifferent whether the undertaking that the seed should be Skirvings Swedes was the contract itself or merely collateral to it. It is clear however from the opinions delivered that the Court considered this to be of the essence of the contract, and

that the purchaser would not, from the first, have been bound to accept any but "Skirvings Swedes."

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In *Azema v. Casella*, L. R. 2 C. P. 431, 677 (Ex. Ch.) the sale was of cotton described by marks "expected to arrive in London *per Cheviot* from Madras. The cotton guaranteed equal to sealed samples in our (the broker's) possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." In a special case on an action for not accepting the cotton, it was stated (*inter alia*) that there was at the time of the contract different kinds of Madras cotton known in the market and divided into Tinnevely, Northern and Western Coconada, and Coimbatore, and Salem, each of which was compared with a standard staple, and divided into different divisions under the terms "ordinary," "low middling," "good fair," and "fine," which were sold at different prices; that the sample was "Long-staple Salem;" that the cotton tendered was not "Long-staple Salem," but was a particularly good sample of Western Madras, and that "the cotton was therefore not in accordance with the sample;" and that "Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different from that which is used for Long-staple Salem." By a judgment of the Common Pleas, affirmed by the Exchequer Chamber without hearing the defendant's counsel, it was held that there was not merely inferiority of quality, but difference of kind, and that the defendants were not bound to accept the cotton. In effect the words of the contract above quoted were construed to contain not only a warranty of quality but also (by implication) a *description* of the cotton sold, as of the *kind* or denomination of cotton to which the sample belonged.

*Azema v.*  
*Casella.*

Somewhat similar to the last-mentioned case, though less fully considered, was the case of *Toulmin v. Hedley* (2 C. & K. 157). The contract was to deliver "a cargo of guano expected by ship S. . . . Quality warranted equal to average imports from Ichaboe, and in sound merchantable condition." It is not easy, from the decision which merely ordered a new trial, to gather the view the Court took of the construction of the contract. But they appear to have considered that the clause expressed as a warranty was intended to be part of the description of the goods sold, and that it was a condition pre-

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cedent of the buyer being bound to accept the cargo that the stuff turned out sound and merchantable, and with not more than an average (having regard to the peculiar circumstances of the trade) admixture of rubbish.

With the case of *Azema v. Casella* may be contrasted that of *Heyworth v. Hutchinson* (L. R. 2 Q. B. 447), where the purchase was also of specific bales (of wool) to arrive, "the wool to be guaranteed about similar to samples in the selling broker's possession." The wool turned out of a quality not about similar to sample, but there was no evidence pointing to its being, in a mercantile sense, a different kind of article from the sample; and the Court held that the clause could only take effect as a warranty. At the hearing before the Exchequer Chamber of *Azema v. Casella*, it was pointed out by Blackburn, J., that the two judgments were perfectly consistent.

Implied condition that goods sold by description shall be merchantable.

Further, under a contract of sale of goods of a specified description, which the buyer has no opportunity of inspecting, and so far as relates to defect not discoverable on inspection, it is an implied condition, of the essence of the contract, that the goods must not only in fact answer the description, but must be saleable or merchantable goods of the description sold (*Gardiner v. Gray*, 4 Camp. 144; *Laing v. Fidgeon*, 6 Taunt. 108; *Jones v. Just*, L. R. 3 Q. B. 197; *Macfurlane v. Taylor*, L. R. 1 Sc. Ap. 245; *Mody v. Gregson*, L. R. 4 Ex. 49; *Randall v. Newson*, 2 Q. B. D. 102).

And where expressly furnished for a certain purpose, that they shall be fit for purpose intended.

And in an executory contract with a manufacturer or dealer who undertakes to furnish an article for a particular purpose, in such circumstances that the buyer necessarily trusts to the judgment or skill of the person supplying the article; there is an implied stipulation (which I think is of the essence of the contract) that the article supplied shall be reasonably fit for that purpose (*Brown v. Edgington*, 2 M. & G. 279. See also *Bigge v. Parkinson*, 7 H. & N. 955, and *Beer v. Walker*, 25 W. R. 880, more particularly referred to p. 326, *post*). But where an article of a known description is ordered of a manufacturer and the thing described is supplied, the contract is satisfied although the article is found unfit for a purpose for which the buyer intended it, and although the intention so to use it was stated

at the time of making the contract (*Chanter v. Hopkins*, 4 M. & W. 399). And exactly on the same principle if a manufacturer contracts to manufacture goods and to deliver them at a distant place, and if (assuming such a case possible) the necessary result of the transit were to render the goods which were sent out in good order, unmerchantable when they arrived, the fact of their arrival in such an unmerchantable condition would not justify the buyer in refusing to accept and pay for them (*Bull v. Robinson*, 10 Ex. 342).

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A sale *by sample*, properly so called, is merely a particular case of a sale *by description*. The goods are impliedly described as being a homogeneous bulk, out of which the sample has been drawn, and the quality of which is therefore represented by the sample. If it turns out that the sample does not truly represent the bulk, the purchaser may reject the goods, either before delivery, or (if the time for inspection as agreed on is subsequent to delivery) after delivery, provided the inspection is made in due time, and the rejection intimated at once. But in either case the purchaser may (if he does nothing to waive his objection) accept the goods tendered and, treating the stipulation as collateral, bring his action upon the warranty.

This is at least the practical result of the cases, though in *Parker v. Palmer* (4 B. & Ald. 395), it is expressly stated in the judgment of C.J. Abbott, that the words "per sample," in a sale of this kind, are not a description of the commodity sold, but a mere collateral engagement. But I think what is really decided in the case of *Parker v. Palmer* was this, that the seller having under the circumstances the option to keep the goods (which he did), and to treat the stipulation as a warranty, there was sufficient ground for overruling, after verdict, a technical objection that the declaration, by omitting the words "per sample," was at variance with the contract. For it was admitted that the buyer might have rejected the goods, and I do not see how this could be unless the stipulation were of the essence of the contract.

It would be quite consistent with the cases, and I believe quite correct, to lay down the rule as to the option in broader

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terms; and to say that where goods are sold by a description (including a sale by sample), on which the buyer relies as the inducement to make the bargain, or where the goods are supplied expressly for a certain purpose in such circumstances that the buyer relies on the judgment or skill of the furnisher, the buyer, though entitled to treat the description or fitness (as the case may be), as of the essence of the contract, and so to reject the goods if not answering to it, may elect (provided he does nothing to waive his objection), to keep the goods, and treating the description (or implied stipulation as to fitness) as a warranty, bring his action for damages accordingly. This rule seems also supported by the case of *Lomi v. Tucker*, (4 Car. & P. 15), where, as a jury found, the buyer was induced to buy certain pictures for £95 by a representation of the sellers that they were originals by Poussin; and in an action for the price, the buyer having kept the pictures, the seller only recovered a sum equal to their value. Lord Tenterden in putting the case to the jury said that if the buyer had not kept the pictures he would not have been bound by his bargain. As another instance of the exercise of a similar option, I refer to *Yates v. Pym* (6 Taunt. 446), where the sale was of "prime bacon," and the buyer having kept the bacon offered, which was affected with an "average taint," recovered on the warranty. See also *Johnson v. Lancashire & Yorkshire Ry. Co.*, 3 C. P. D. 499.

The principles of sale by sample are much discussed in the case of *Heilbutt v. Hickson*, L. R. (7 C. P. 438), the case of a contract for shoes for the French army, and *Couston v. Chapman* (L. R. 2 Sc. Ap. 250), a Scotch appeal, arising out of a sale of wine by sample. In both, the right of rejection is throughout assumed as a necessary incident of the contract, but the question in both cases turned upon whether the goods had been so dealt with or accepted as to put an end to the right of rejection. In the opinion of Mr. Justice Brett in *Heilbutt v. Hickson* (L. R. 7 C. P. 456), it is said that a contract for sale by sample "contains an implied term that the goods may under certain circumstances be returned." This seems to me only another and less direct way of saying that it is a condition, or implied term of the essence of the contract, that the bulk shall agree with the



sample (see *M'Mullen v. Helberg*, 4 L. R. Ir. 94, and *per Fitzgerald, J.*, p. 100).

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It is a necessary consequence of the right of rejection that the buyer shall have a reasonable opportunity of inspecting the bulk, and the refusal by the vendor to allow such inspection is a breach of the contract entitling the buyer to treat the contract as rescinded (*Lorymer v. Smith*, 1 B. & C. 1).

In many cases, which are not properly sales *by sample*, a sample is employed by way of a *standard* for comparison. That is to say, a sample is taken out of bulk A, being goods of the description bargained for, and the goods in bulk X and bulk Y are sold guaranteed equal to this sample. In a case of this kind the accordance of the goods with the sample is not necessarily of the essence of the contract. It may of course by apt words be made so, but the presumption is that in such a case a mere difference of quality does not entitle the buyer to reject the goods, but only gives him a claim as on a collateral warranty (*Heyworth v. Hutchinson*, L. R. 2 Q. B. 447). The difference between this case and *Azema v. Casella*, L. R. 2 C. P. 431, has been already pointed out. It will be observed that what was in that case held as description, was not the words "the cotton guaranteed equal to sample," but some words implied such as those in the italics which follow:—"The cotton, *namely cotton of that description known as Long-staple Salem of which we have a sample in our possession*, guaranteed, &c."

Sale with warranty where the warranty refers to a sample.

Where the sale is of securities, it is implied as part of the description by which they are sold, that they are genuine securities of the kind specified. So where the subject of sale is a bill of exchange, it is implied (as of the essence of the contract) that the bill is a genuine bill drawn, accepted and indorsed according to its purport; and if the signatures turn out to be forgeries, the person who has discounted the bill can recover back the money from the person to whom he paid it; there being in effect no consideration for the payment of the money (*Jones v. Ryde*, 5 Taunt. 488; *Westropp v. Solomon*, 8 C. B. 345; *Gurney v. Womersley*, 4 E. & B. 133). And where the subject of the sale was an unstamped bill of exchange,

Genuineness implied as part of the description in sale of securities.

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purporting to be a foreign bill, it was held that, being in fact an inland bill, it did not answer the description of what was sold, and that, both parties having been ignorant of the defect at the time of the sale, the purchaser could recover back his money (*Gompertz v. Bartlett*, 2 E. & B. 849). And where persons contract for the sale of certain documents purporting to be securities of a certain description; there being at the time known marketable securities of this description; it will be presumed that the parties intend to contract with reference to such known marketable securities; and if the particular documents turn out (owing to some circumstance unknown to the parties at the time) to have a defect rendering them unmarketable, the contract is deemed a nullity and the money paid under it may be recovered back (*Young v. Cole*, 3 Bing. N. C. 724). In this case the bonds purported to be "Guatemala Bonds," there being at the time securities of this description known and dealt with in the market;—the defect was the want of a stamp, and this, although both parties were at the time of the sale ignorant of the circumstance, rendered the bonds unmarketable.

Sale of goods  
"to be shipped"  
within a certain  
date.

I shall now cite cases as to the meaning and importance of the description of goods in a contract for sale, as "*to be shipped*" *within a certain date*. It has been already shown (p. 300, *ante*) that where goods shipped or intended to be shipped are expressly described in a contract of sale, it is of the essence of the contract that the goods furnished shall agree with the description. As to the *importance* of these words "*to be shipped, &c.*," it is therefore enough to say that they are construed as *words of description*. That they are so construed is assumed throughout the cases on the subject, and is consistent with the observation already made (p. 239, *supra*) to the effect that goods, on shipment, became invested with a new specific character, so that (generally speaking) their existence as specific identifiable things dates from the shipment and no further back.

The question then is:—What is the meaning of the description of goods as "*to be shipped in*" or "*during*" a certain period?

In *Alexander v. Vanderzee*, L. R. 7 C. P. 530, the defendant contracted for the purchase from the plaintiff of a quantity of maize "fair average quality of the season and port of shipment when shipped. To be shipped from, &c. . . . by three or more 1st class vessels. . . . For shipment in June and [or] July, 1869 (old style), seller's option."

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*Alexander v.*  
*Vanderzee.*

Two cargoes were tendered by the plaintiff in part fulfilment of the contract; the loading of which (at Ibraila) had commenced on the 12th and 16th May respectively, and the bills of lading were dated the 4th and 6th of June respectively. Somewhat less than the half of each cargo had been put on board in May. The defendant rejected the offer of these cargoes. The case was tried in London before Mr. Justice Brett and a jury. There was some evidence that a cargo of maize shipped in May is generally more liable to be heated than a cargo shipped in the month of June. It was submitted for the defendant that he was not bound to accept these cargoes under the contract, and that the construction was for the judge, and not for a jury: but notwithstanding this, the judge left for the jury to say whether the shipments were June shipments from Ibraila in the ordinary business sense of the term, and the jury found that they were. The judge thereupon directed the verdict to be entered for the plaintiff, reserving leave to the defendant to move. The ruling of the judge was sustained by the Court of Common Pleas, and the question then came before the Exchequer Chamber, when the majority of the Court (Martin, B., Blackburn, Mellor, and Lush, JJ.) concurred in thinking that the assistance of the jury was rightly called in, and that their finding was satisfactory. Kelly, C.B., however, doubted and indicated an opinion that the construction was for the judge, and that the natural meaning was that the cargoes should be shipped in June or July, and not partly in May, particularly as there was evidence that a May shipment was more likely to heat.

A contract, in nearly, but not quite, similar terms, came under discussion in *Shand v. Bowes* (reported 1 Q. B. D. 470; 2 Q. B. D. 112; and, under the name of *Bowes v. Shand*, 2 App. Ca. 455), with the result that the Court of ultimate appeal, affirming the judgment of the Queen's Bench Division, and

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*Bowes.*  
*Bowes v.*  
*Shand.*

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reversing that of the Court of Appeal, held that a contract for purchase of goods "to be shipped . . . . *during* the months of March <sup>and</sup><sub>or</sub> April . . . ." was not fulfilled by the tender of goods, of which a greatly preponderating quantity had been put on board (and the lading of three out of the four parcels completed as shown by the bills of lading) in February, and only a small part in March on the day when the bill of lading was signed for the last parcel.

The facts were these:—The defendant had contracted to purchase from plaintiffs 600 tons rice by two separate contracts dated 17th and 24th March, 1874, the description in each contract being as follows:—"The following Madras rice to be shipped at Madras or coast for this port during the months of March <sup>and</sup><sub>or</sub> April, 1874, about 300 tons, per *Rajah of Cochin*." The 600 tons filled 8200 bags, for which bills of lading were given in four different parcels on the 23rd, 24th, and 28th of February, and the 3rd of March. All the bags were *put on board* in February except fifty bags of the last parcel, which were put on board on the 3rd March, the day when the last bill of lading was signed. The action was tried before Mr. Justice Brett and a jury. The only evidence of mercantile usage was to the effect that in such contracts "shipped" was understood to mean "put on board." The learned judge left the question to the jury, as he had done in *Alexander v. Vanderzee*,—"Was the cargo, as a cargo, a shipment in March <sup>and</sup><sub>or</sub> April in the ordinary business sense of the term?"—adding that if the question were for him, he should hold it sufficient, if the loading had been conducted consecutively, with ordinary and reasonable dispatch, and was completed in March or April, so that the vessel, so far as the loading of the cargo was concerned, might sail in March or April. The jury said they agreed with the construction which the judge had put, where the name of the vessel is given in the contract. A verdict was accordingly taken for an agreed-on sum, and judgment entered for the plaintiffs, with leave to move.

The question coming before the Queen's Bench Division, a judgment was delivered by Blackburn, J., in which Mellor and Lush, JJ., concurred. It was observed in this judgment that if the shipment of all four parcels had been like the last, com-

menced in February, but completed and the bills of lading signed in March, the case would have been identical with *Alexander v. Vanderzee*, and the Court would have been bound by the judgment of the Exchequer Chamber in that case. But since the three earlier parcels (constituting nearly nine-tenths of the cargo), were in every sense of the word completely shipped in February, and the defendants were entitled to have the whole quantity, substantially, shipped in March or April, the defendants were, upon the undisputed facts, entitled to judgment.

The judgment of the Queen's Bench Division was taken by the plaintiff to the Court of Appeal, and was there reversed by a unanimous judgment of the Court (Kelly, C.B., Mellish, L.J., and Brett and Amphlett, J.J.A.) delivered by Mellish, L.J. "The real question," they say, "is whether, in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April. This seems to us to be substantially the same question as that which was decided by the Court and jury in *Alexander v. Vanderzee*." Upon the authority of that case and also having regard to the presumable object of the purchaser in making the stipulation, namely, that he might know when the goods were likely to arrive, they adopted the latter alternative.

In the House of Lords, the peers present being the Lord Chancellor (*Cairns*) and Lords Hatherley, O'Hagan, Blackburn, and Gordon, the decision of the Court of Appeal was, again unanimously, reversed; and that of the Queen's Bench Division restored. I shall quote from the judgment of Lord Blackburn, which is substantially in agreement with that of all the Lords, as being the most weighty and instructive. "The question," he says, "which arises in this case is, whether the rice here tendered was shipped within the period stipulated for or not. That evidently involves in it two questions: first, what is meant by the word "shipped" as used in this contract? and, secondly, the question of fact whether the things which are proved in evidence to have taken place as regards these defendants did amount to a shipping of the rice within the

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meaning which ought to be put upon the contract. . . . In the absence of any evidence of mercantile usage . . . it seems to me that where a parcel of goods is begun to be put on board on or after the 1st of March, and they are all finally put on board so that the shipment is entirely completed before the 31st of March, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment; the whole shipment is completed in that month. But there would be a good deal more difficulty in saying whether it was a March shipment or not, if the case were this: suppose the shipment of a large parcel of goods goes on, as one transaction, which occupies several days; suppose for example, the shipment of a large parcel of goods which may take ten days or so to put on board, has been begun before the end of the month of February, and has been proceeded with continuously with reasonable dispatch, and in the ordinary way as a matter of fair dealing, and the completion of the shipment is in March although the commencement was in February, and the bill of lading is taken in March, I think the materiality of the bill of lading would merely be as evidence to show that the shipment was then completed. I do not think the delaying of the bill of lading for a fortnight would make the date of the shipment a fortnight later. I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading; but the bill of lading would be strong, and in most cases, conclusive evidence, of the date when the shipment was really completed. I think, in a case of the sort I have supposed, there is a serious and grave question, whether or no the shipment may be considered as being made partly in one month and partly in the other, or whether it may not be considered as made at the time when the one indivisible transaction of putting those bags of rice on board was ended and completed, resulting in the whole parcel being on board, so that there is now a right to say: We have shipped this cargo, or portion of cargo, and we are now entitled to a bill of lading. That was the case which arose in *Alexander v. Vanderzee*.

\* \* \* \* \*

"The facts are here that the great bulk of this rice was put on board during the month of February. For the great

bulk, nine-tenths of it, bills of lading were signed in the month of February. With regard to the remaining one-tenth, a large part of that one-tenth was put on board in February, but a small portion amounting, I think, to four tons, was put on board in March, and the bill of lading of the last parcel was signed in March. Under these circumstances it seems to me, that putting aside the mercantile evidence altogether, or having none, it is quite clear that, as far as regards those nine-tenths which were put on board in February, and the shipment of which was completed in February, as was indicated by the taking of the bills of lading then, it was not part of a continuous operation eked out by putting on board four more tons in March. It seems to me that it was so completely a February shipment that, had this contract been slightly differently worded, and had it said 'shipped in February' instead of saying 'shipped in March <sup>and</sup> <sub>or</sub> April' the defendants clearly must have taken this as a February shipment—they could not have rejected it. I think that equally applies to the present case; being a February shipment it cannot be a March shipment."

The net result is that the decision of *Alexander v. Vanderzee*, although questioned (and some of the Lords were perhaps more inclined than Lord Blackburn to question its soundness) is not overruled, and if another case on all fours with it should come before the Court and a similar verdict be given, it may be sustained. But that case cannot now be quoted as laying down any general rule of construction so as to make the point of time when the shipment is completed and the bill of lading given the sole criterion whether the goods answer the description. On the contrary, the period during which the goods are put on board is the thing to be looked to, but whether the whole of this time must be confined within the month named, or whether if done continuously the lading may be looked upon as one act to be dated from the time of its completion, is left by the judgment of the Lords to be an open question, upon which however the former alternative seems the more likely to prevail.

Where the contract was for purchase of goods "to be dispatched" from St. Petersburg not later than 31st July, it was

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held sufficient that the goods were sent off in lighters by that day (*Busk v. Spence*, 4 Camp. 329).

Where a sale was made on the 1st of May of goods, to be paid for, according to the invoice, "in six or eight weeks," and action was brought for payment on the 18th of July. The judge having left it to the jury to say what was the fair mercantile meaning of the expression "from six to eight weeks," they found that the action had not been brought prematurely. The Court of Common Pleas on the authority of *Alexander v. Vanderzee* held that the question was properly left to the jury, and sustained the verdict (*Ashforth v. Redford*, L. R. 9 C. P. 20).

Impossibility,  
original or  
supervening.

If the thing expressed to be promised under a contract (of sale or otherwise) is physically impossible, *quod natura fieri non concedit*, the contract is void; and if after the making of the contract the thing promised has become impossible through the act of God, the obligation is at an end (*Benjamin*, 2nd ed. 455, 459, and authorities there cited).

In the former case the contract is regarded as simply meaningless; in the latter the agreement is construed as subject to an implied condition.

Implied condition that  
performance is  
possible.

This implied condition is perhaps more correctly expressed as follows:—Where the continued existence and fitness of a certain person or thing is a necessary condition to render the performance of a contract possible, it is an implied term of the contract that, if, by some force or cause which it is beyond human skill or foresight to avert, the person or thing shall cease to exist or to be in a state of fitness, then the performance so far as relates to the period subsequent to the change of circumstances is excused on both sides.

Examples.

So where there is an agreement to sell and deliver a horse on a fixed future day and the horse die in the interval (*Benj. et sup.*, *Williams v. Hill*, Palm. 548). So where a music hall was let for a particular day, and meantime burnt down accidentally (*Taylor v. Caldwell*, 3 B. & S. 826). Where, pending a contract of personal service, one of the parties has died (*Boast v. Firth*, L. R. 4 C. P. 1; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Whincup v. Hughes*, L. R. 6 C. P. 78). Where an eminent



*artiste* agreed to play at a concert, but (without fault) was, when the time came too ill to do so (*Robinson v. Davison*, L. R. 6 Ex. 269). In all these cases the performance has been excused. And where work was agreed to be done by one party on the premises of the other, to be paid for on completion, and the premises were destroyed by accidental fire in such a way as to render the completion of the work impossible, it was held by the Exchequer Chamber on appeal from the Common Pleas, that the result was to excuse both parties from the further performance of the contract but to give a cause of action to neither (*Appleby v. Myers*, L. R. 2 C. P. 651, reversing same case L. R. 1 C. P. 615). And where there was a contract for the sale of 200 tons of potatoes off a certain piece of land which, in ordinary years, was amply sufficient to produce such a crop, but owing to blight only produced eighty tons which were delivered, it was held by the Court of Appeal, affirming the decision of the Queen's Bench, that the vendor was excused from the performance, so far as relates to the remaining 120 tons (*Howell v. Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258).

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And if, after a contract has been entered into, the performance becomes *legally* impossible, or is prevented by an act of State of our own Government, there is, by similar implication, an excuse from further performance (*Baily v. de Crespigny*, L. R. 4 Q. B. 180; *Newby v. Sharpe*, 8 Ch. D. 39).

And that it shall continue to be lawful.

But where the thing agreed to be done is not in itself physically impossible, although the contractor is in fact unable to carry it out (*Kearon v. Pearson*, 7 H. & N. 386; *Jones v. St. John's Coll.*, L. R. 6 Q. B. 115), or where the law or act prohibiting or preventing the performance is that of a foreign government (*Burker v. Hodgson*, 3 M. & S. 267; *Kirk v. Gibbes*, 1 H. & N. 810), he is not excused; unless indeed both parties have become incapacitated, as for instance where the act prevented is one in which both parties ought, according to the contract, to have concurred (see *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 137; 5 Q. B. 544).

More inability of contractor no excuse.

A curious case decided by Jessel, M.R., (*In re Arthur, Arthur v. Wynne*, 14 Ch. D. 603) was this:—By marriage settlement (in the Scotch form) the husband assigned to his marriage trustees two policies of assurance on his life for £5000

If covenanting party has the option of performing within a certain period, and by delay

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performance  
becomes  
impossible.

each expiring at a date about two years after the marriage, and bound himself on or before that date to effect a new policy for £10,000. He took no steps to effect a new policy until the day before the expiry of the old ones; and by that time in consequence of a then recent change in his health, his life had become uninsurable. The Master of the Rolls held that, having had ample time within which he might have fulfilled the obligation, he was not excused from it; and decided that his estate was liable to the trustees for the £10,000.

Contract con-  
ditional on act  
of third  
person.

If a sale is made expressly conditioned upon an act, or for a price to be fixed by reference to an act (*e.g.*, the 'making of a valuation') to be done by a third person, that is considered as of the essence of the contract, and if this third person refuse (without default of either party to the contract)<sup>1</sup> to perform the act, the sale cannot take effect (*Thurnell v. Balbirnie*, 2 M. & W. 786).

Where, however, an agreement was made in the following terms:—"Agreed to sell my horse P. to J. B. for the sum of £200, provided that he trots eighteen miles within one hour: and that to be done within one month from this day, and J. N. to be the judge of the performance: if the above task is not performed the horse is hereby sold to the said J. B. for the sum of 1s., which he has this day paid to me." In an action for delivery of the horse, it was held, on demurrer to a plea averring that J. N. had refused to act as judge, that the agreement meant a sale of the horse for 1s., with a condition subsequent that there was to be a further payment if the horse performed the task assigned; but as it was essential to the performance that J. N. should act as judge, the condition failed, and the extra payment could not be required as a condition of the delivery of the horse. There was a further question, whether the contract as so authorised was not an illegal wager, but no decision on that point was given at this stage of the case (*Brogden v. Marriott*, 2 Bing. N. C. 473).

<sup>1</sup> If the sale is conditioned upon something to be done which becomes impossible by default of one of the parties, it will be considered,

as against the defaulter, that the condition is fulfilled (*Mackay v. Dick*, H. L. on appeal from Scotland, 6 App. Ca. 251).

It will be observed that under circumstances of the kind here under discussion, there is a great practical difference between the case of an executory contract for sale, and that of a contract for work to be done (*e.g.*, upon the house or land of another). Where there is a contract for work to be done, and the payment for the work is conditioned upon the act of a third party, the contractor may lose the fruit of his labour altogether, if the condition fails without the fault of the other: it being clear that he cannot in such a case fall back on a *quantum meruit* (*Ranger v. G.-W. Ry. Co.*, 5 H. L. C. 72, 101); unless indeed performance has been hindered by the act of the other party (*Taylor v. Guppy*, 3 M. & W. 387). In the case of an executory sale of goods, however, unless the subject-matter has perished (a case already dealt with, p. 314 *supra*), the vendor is simply left with the goods on his hands. If indeed there has been a part delivery of the goods, and the goods so delivered are kept and not redemanded, there would (if the contract itself was not divisible) be a presumption of a fresh contract to take the goods so delivered at a fair price; or if the original contract price were in its nature apportionable (*e.g.*, if fixed by weight or number of things having a fair average quality) then at an apportioned part of the original contract price.

The bargain called "sale or return" is an example of a sale dependent on a condition; the buyer's election to keep the goods, as shown by his not returning them, being a condition precedent to the sale taking effect. The effect of the transaction has been stated in *Moss v. Sweet*, 16 Q. B. 493, as follows:—"Where goods delivered on *sale or return* are not returned within a reasonable time, the sale of the goods becomes absolute." This is doubtless a correct view of the bargain strictly called "sale or return." The phrase has, however, been somewhat loosely applied to special contracts between dealers, or between manufacturer and dealer having for their ultimate object the disposal of the goods to the public.

"Sale or return."

The following three cases are instances of such special contracts, but in none of them, I think, is the bargain one of "sale or return" properly so called.

Special contracts for supplying retail dealers.

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In *Livesay v. Hood*, 2 Camp. 83, there was a contract between a wholesale and a retail dealer, that the former should from time to time supply the latter with goods up to £100, which the latter was to sell, settling monthly with the former at certain prices agreed upon between them for the goods sold. The question arose on the bankruptcy of the retail dealer, whether the goods on hand under this arrangement were in his reputed ownership, and it was held that they were. "Under the agreement," it was said, "the bankrupt was to sell these goods not as factor but as principal." In the case of *Ex parte White, in re Nevill*, L. R. 6 Ch. 397, a question arose out of a course of dealing between a manufacturer and a dealer, by which the goods sold by the latter to customers were settled for monthly between the parties according to a certain price list. The dealer was not restricted as to the prices he should charge to customers, or the credit he should allow them. The question was whether the monies received by the dealer from the customers, were received on his own account, or as agent for the manufacturer, and the decision was that he received them on his own account. The transaction was held, in effect, to be, that each piece of goods was delivered to the dealer upon the terms that if and when he sold any to a customer, he should be taken to have purchased the same from the manufacturer at the price in the list.

In the case of *Ex parte Bright, in re Smith*, 10 Ch. D. 566, there were terms of arrangement in writing, which, at first sight, seem very like the course of dealing in the last case. The terms proposed by the consignees and which were in substance accepted by the manufacturers were as follows :—"It is agreed that, when quoting prices to us, you are to make them as low as possible, leaving yourselves only the ordinary manufacturing profit which you are in the habit of getting. 2nd. It is agreed that we shall offer and sell your goods throughout Great Britain and Ireland, at such an advance on your prices as we may deem right, so as to leave us a fair commission covering travelling expenses, &c. 3rd. It is agreed that we shall be entitled to retain this advance obtained on your cost, but that all other money or bills which shall be received by us as payment for your goods shall be duly collected and remitted by us.

4th. We agree to guarantee all accounts." It was held by the Court of Appeal that the transaction between the manufacturer and consignee was not one of sale, conditional or otherwise, but one of agency. It was further held that the reputed ownership clause did not apply, because the consignees described themselves to the world both on a brass plate on the door of their place of business and on their invoices as "merchants and manufacturers' agents."

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§ 3.

As further instances of contracts of conditional sale where the sale became absolute upon the fulfilment of the condition, I may mention *Bianchi v. Nash*, 1 M. & W. 545; and *Beverly v. Lincoln Gas Co.*, 6 Ad. & E. 829. And where the sale became void by the failure of the condition, *Elphick v. Barnes* (5 C. P. D. 321); *Head v. Tattersall* (L. R. 7 Ex. 7); and see p. 323, *post*.

Various special conditions.

Where a trader, in consideration of a loan of money, assigned his stock in trade by a bill of sale under a proviso that until default in payment of the loan the debtor should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee, and the trader subsequently sold the goods by private contract fraudulently and not in the ordinary course of his business; it was held that this transaction did not come within the permission of the proviso, and the property remained in the first grantee, although the second vendee was in *bonâ fide* (*Taylor v. McKeand*, 5 C. P. D. 358). It is to be observed that there was no question as to the right of creditors under the protection of the Bills of Sale Act or the Bankruptcy Act.

#### SECTION IV.—QUESTIONS ARISING ON TERMS OF THE CONTRACT COLLATERAL TO ITS ESSENTIAL OBJECTS.

Under this head the questions of general importance usually arise on stipulations in the nature of warranty. A *warranty* has been defined as "an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract collateral to the express object of it" (*per* Lord Abinger in *Chanter v. Hopkins*, 4 M. & W. 399, 404); and it has been laid down that "an affirmation at the time of a sale is a warranty, provided it appear on evidence to

Warranty defined.

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§ 4.

Representations,  
different  
kinds of.

1st. Representations where buyer is presumed to exercise independent judgment.

2ndly. Where relied on as the consideration for part of the price.

3rdly. Where essential, i.e., entering into the consideration for the whole obligation of the buyer.

have been so intended " (*per* Buller, J., citing Holt, C.J., in *Pasley v. Freeman*, 3 T. R. 51, 57).

To explain the definition, it is necessary to distinguish the circumstances under which statements, or *representations*, are made.

*First*, there may be a representation of a fact such, or under such circumstances, that the buyer is not presumed, in making his contract, to have relied on it. Such are mere puffing statements in regard to goods bought *in specie*, the buyer having, before or at the time of the contract, the opportunity of examination, and the means of judging for himself as to the correctness of the statement. Upon such representation (even if expressed in the contract itself), the seller is not liable unless he has made the statement knowing it to be false. But if the seller made the statements knowing them to be false, the buyer, if in fact misled, has his remedy. For though he is presumed not to have relied upon the truth of the statement, and so far to have exercised his own judgment; he may be presumed to have relied upon the seller having believed the statement to be true. The ground of his remedy is a fraud on the part of the seller; and to this I shall revert in the sequel.

*Secondly*, there may be a representation of a fact on which the buyer is presumed to have relied as entering into the consideration for some *part* of the promise on his part. This is the same as to say (where the representation is by the seller regarding the thing sold) that the truth of the representation is made part of the contract, not as a *condition* of the transfer of property being carried out, but as a matter collateral to that primary object being carried out. In this case there is a *warranty* properly so called.

*Thirdly*, there may be a statement or representation, such that the buyer is presumed to have relied on it as entering into the consideration for the whole of the engagement on his part. And in this case the truth of the statement is a *condition precedent* as already explained (p. 300, *ante*). And the sorts of statements which are construed as *conditions* have been already reviewed (pp. 300—305 *ante*).

In the present section I confine myself to the consideration of *warranties* properly so called.

A statement made by the seller at the time of the contract is a warranty if the parties intend the seller, as part of the contract, to undertake that the statement is true.

If the contract is contained in a document intended by both parties to embody its terms, such a document is, according to the principle already explained (p. 196, *supra*), the primary and only evidence of the terms, and if it does not contain the statement there is an end of the matter (*Pickering v. Dowson*, 4 Taunt. 779; *Freeman v. Baker*, 5 B. & Ad. 797; *Kain v. Old*, 2 B. & C. 627). But it is not every document embodying terms of a contract which is thus conclusive. For the parties may have intended the document to be a record, not of the whole terms of the contract but of certain terms only (*Allen v. Pink*, 4 M. & W. 140). And an informal document such as a receipt stating the goods and price, raises no presumption of the intention to record the whole transaction although a document bearing on the face of it to be a sale or contract note, would raise such a presumption very strongly.

Accordingly, there are two cases in which parol evidence of the intention is admissible; 1st, where it does not appear that the parties have adopted any document as embodying the whole terms of their contract (*e.g.* in *Cave v. Coleman*, 3 M. & R. 2); 2ndly, where there is such a document, but the document is in its terms ambiguous, so that on the document itself it remains doubtful whether a statement or description regarding the goods is intended to be a warranty or merely a representation or statement of belief on the part of the seller not intended to be relied on by the other; or, it may be, a superfluous description of goods whose identity and essential qualities can be established and ascertained independently of it.

Cases of the *first* class are *Cave v. Coleman* (3 M. & R. 2), where the warranty was established; and *Hopkins v. Tanqueray* (15 C. B. 138) and *Stuckley v. Bailey*, 1 H. & C. 405, where it was not. Cases of the *second* class are *Power v. Barham* (pictures—"Canaletti," 4 A. & E. 473), where the warranty was established; and *Jeudwine v. Slade*, 2 Esp. 572 (pictures—"Claude Lorraine" and "Teniers"), where Lord Kenyon thought there was no warranty.

In *Wood v. Smith*, 5 M. & R. 124, a statement by the seller

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§ 4.

Statement made at time of sale is a warranty, if so intended by parties.

Evidence of warranty, when by written contract only.

When admissible by parol.

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§ 4.

of a horse at the time of sale,—“he is sound to the best of my knowledge but I will not warrant him,” was held to import a qualified warranty that the seller knew of no unsoundness.

Construction of  
express  
warranties in  
writing.

I shall here state some rules of construction which have been laid down, or which may be deduced from the cases relating to warranties.

Where the contract for the sale of goods is in writing, and contains a particular express warranty, the Court will not extend such warranty by implication of intention arising from the circumstances. This was laid down in the case of *Dickson v. Ziziana*, 10 C. B. 602, and is only an application of the leading rule as to written contracts already frequently adverted to. The contract in the case here referred to was for sale of a cargo of Indian corn, with an express warranty that the quality was equal to the average of shipments of Salonica of that season, and that the corn had been shipped in good and merchantable condition. The judge had left it to the jury to say whether the corn was at the time of shipment in a good and merchantable condition *for a foreign voyage*; and this was held a misdirection.

Where however the purpose for which the goods were to be furnished was expressed in the contract, as where the contract was to supply “troop stores,” it was held that the implied condition or warranty in the election of the buyer (as explained p. 305, *ante*), that they should be fit for that purpose, was not excluded by an express warranty of something else, as that they should pass inspection of the H.E.I.C.’s officers (*Biggs v. Parkinson*, 7 H. & N. 955, p. 325, *post*).

Express warranty of one quality is ground for an inference that statements of other qualities made in the writing are not intended to be warranties (*Budd v. Fairman*, 8 Bing. 48; *Anthony v. Halstead*, 37 L. T. N. S. 433). The word “warranted,” of a horse, standing by itself, has been construed to imply a warranty of soundness exclusively (*Richardson v. Brown*, 1 Bing. 344). Instances of statements in writing by the vendor which have been held to be warranties are *Shepherd v. Kain* (5 B. & Ald. 240), where a vessel was advertised as “copper-fastened,” and *Cowdy v. Thomas* (36 L. T. N. S. 22), where in answer to a question on the treaty for sale of a loco-



motive the vendor wrote, "firebox and tubes are copper," and it turned out that some of the tubes were iron. In both these cases inspection was allowed, but it was inferred that the inspection was for the purpose of the buyer satisfying himself on other points; being entitled to assume the truth of the statements made as above mentioned.

A time limited in the warranty of a horse, thus:—"warranted—one month," has been held to mean a warranty against such faults only as shall be discovered in the month (*Chapman v. Gwyther*, L. R. 1 Q. B. 463; *Bywater v. Richardson*, 1 Ad. & E. 508). It is a very usual practice in public sales of horses, to couple a stipulation in the nature of warranty limited as to time, with a further stipulation that the horse is to be returned within the time, so making the discovery of a fault and return of the horse within the time a condition subsequent annulling the sale. This practice is referred to by C.J. Tindal in *Watson v. Denton*, 7 Car. & P. 85, 89; and instances occur in *Mesnard v. Aldridge* (3 Esp. 271); *Adams v. Richards*, 2 H. Bl. 573, and *Hinchcliffe v. Barwick*, 5 Ex. D. 177, where the buyer not having returned the horse within the time was barred from insisting on the stipulation as a warranty. It has been held that the right to return the horse under such a condition was not defeated by an accident happening to the horse in the meantime without the fault of the vendee (*Head v. Tattersall*, L. R. 7 Ex. 7; see also *Elphick v. Barnes*, 5 C. P. D. 321, and p. 319, *supra*).

The term "sound" in the warranty of a horse or other animal has been carefully defined by Baron Parke in *Kiddell v. Burnard* (9 M. & W. 668, 670), quoting, with the approbation of his colleagues, his own language in *Coates v. Stevens*, 2 Mood. & Rob. (57, 58). "The term," he says, "implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes or in its ordinary progress will diminish his natural usefulness in the work to which he would properly and ordinarily be applied." This definition is perhaps slightly extended by the case of *Holliday v. Morgan* (1 E. & E. 1) in which it was held that a congenital extraordinary convexity in the eye causing short-sightedness and a consequent tendency in the horse to shy, was unsoundness.

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Construction of  
express  
warranties in  
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the agent has authority to do all such  
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*Gibson*, 2 Camp. 555, where a  
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the opinion that the servant had  
He does not, however, seem to  
circumstance that the sale was at  
whether this expression of opinion  
the vendor is a horse-dealer, the person  
authorised to sell, is authorised to  
*Sheward*, L. R. 2 C. P. 148, see  
2 B. & Ald. 673, 679).

Implied  
warranty.  
General rule,  
*Caveat emptor*.

It is the general rule in English  
warranty of quality in the sale of  
summarized in the words "*Caveat*  
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nty. The defendant contracted with the plaintiffs

terms:—"I hereby undertake to supply your

Victoria to Bombay with *troop stores*, viz.,

. at £6 15s. 6d. per head, guaranteed to pass

H.E.I.C.'s officers, and also to guarantee the

er invoice, to be on board on Sept. 13." Stores

under the contract, passed survey, and were

accordingly. They proved to be unsound and

nd action was brought for breach of contract—

an implied warranty. The case came before the

mber on a bill of exceptions to the ruling of the

on, who had directed the jury that, there being

arantee, no implied promise of the defendant

rted into the contract. The judgment of the

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Parkinson, &c.*

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Construction of  
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Where the contract for the sale of goods is in writing and contains a particular express warranty, the Court will extend such warranty by implication of intention arising from the circumstances. This was laid down in the case of *Dickinson v. Ziziana*, 10 C. B. 602, and is only an application of the leading rule as to written contracts already frequently adverted to. The contract in the case here referred to was for sale of a cargo of Indian corn, with an express warranty that the quality was equal to the average of shipments of Salonica of that season and that the corn had been shipped in good and merchantable condition. The judge had left it to the jury to say whether the corn was at the time of shipment in a good and merchantable condition *for a foreign voyage*; and this was held a misdirection.

Where however the purpose for which the goods were to be furnished was expressed in the contract, as where the contract was to supply “troop stores,” it was held that the implied condition or warranty in the election of the buyer (as explained p. 305, *ante*), that they should be fit for that purpose, was not excluded by an express warranty of something else, as that they should pass inspection of the H.E.I.C.’s officers (*Bigge v. Parkinson*, 7 H. & N. 955, p. 325, *post*).

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## § 4.

For a catalogue of the diseases which have been found by juries under the direction of a judge to constitute or not to constitute unsoundness in a horse, I refer to Oliphant on the Law of Horses, and the cases cited in Benjamin, 2nd ed., pp. 505, 506.

The following rule of construction is deduced by Mr. Benjamin from the cases of *Liddard v. Kain* (2 Bing. 183), and *Margeson v. Wright* (twice tried and reported, 7 Bing. 603, 8 Bing. 454):—"A general warranty," says Mr. Benjamin, "does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect." I cannot improve upon this statement.

Whether an agent for sale has implied authority to give a warranty of quality must depend on the usage of the market in which the sale takes place; it being necessarily implied that the agent has authority to do all such things as are usual to be done in sales of the kind in question. What is usual is a question of evidence (*Dingle v. Hare*, 7 C. B. N. S. 145).

In *Brady v. Todd*, 9 C. B. N. S. 592, the Common Pleas decided that a person, not a horse dealer, selling a horse by a servant by private sale did not impliedly authorise the servant to give a warranty. This does not expressly overrule *Alexander v. Gibson*, 2 Camp. 555, where a horse had been sold by the defendant's servant at a fair, and Lord Ellenborough expressed the opinion that the servant had implied authority to warrant. He does not, however, seem to have laid any stress on the circumstance that the sale was at a fair, and it may be doubted whether this expression of opinion has now any weight. When the vendor is a horse-dealer, the presumption is that his servant authorised to sell, is authorised to give a warranty (*Howard v. Sheward*, L. R. 2 C. P. 148, see also *Sandilands v. March*, 2 B. & Ald. 673, 679).

Implied  
warranty.  
General rule,  
*Caveat emptor*.

It is the *general* rule in English law that there is no implied warranty of quality in the sale of goods; the principle being summarized in the words "*Caveat emptor*." The purchaser can only have relief, if he prove fraud on the part of the seller

(*Parkinson v. Lee*, 2 East, 314; *Burnby v. Bollett*, 16 M. & W. 644; *Emmerton v. Matthews*, 7 H. & N. 586).

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A large class of exceptions to the rule is furnished by the principle already stated, p. 300, *ante*, where the sale is *by description* (including sales by sample) as there defined. Another hardly less important class of exceptions is furnished by the rule (stated p. 304, *ante*), where the goods are (by the terms of the contract) supplied for a particular purpose. It has been shown (p. 306, *ante*), how, in these exceptional cases the buyer to whom goods are tendered as in pursuance of the contract, may waive the essentiality, and treat the vendor's obligation in respect of the standard or quality, as one in the nature of a collateral stipulation, or implied warranty.

Exceptions.

The important cases on this subject have already been considered under the head of Sales by Description, &c., treated of at pages 300—307, *ante*. I here, for illustration, further refer to the case of *Bigge v. Parkinson* (7 H. & N. 955), where the question came before the Court in the form of an action upon the warranty. The defendant contracted with the plaintiffs in the following terms:—"I hereby undertake to supply your ship the *Queen Victoria* to Bombay with *troop stores*, viz., dietary, &c., . . . at £6 15s. 6d. per head, guaranteed to pass survey of the H.E.I.C.'s officers, and also to guarantee the quantities, as per invoice, to be on board on Sept. 13." Stores were tendered under the contract, passed survey, and were taken on board accordingly. They proved to be unsound and unwholesome, and action was brought for breach of contract—in effect, upon an implied warranty. The case came before the Exchequer Chamber on a bill of exceptions to the ruling of the Lord Chief Baron, who had directed the jury that, there being no express guarantee, no implied promise of the defendant could be imported into the contract. The judgment of the Court (consisting of Cockburn, C.J., Wightman, J., Crompton, J., Keating, J., and Byles, J.) was as follows:—"There are two questions:—*First*, whether upon a contract to supply provisions there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended. Upon that point no doubt can be entertained. The principle of law is correctly stated in the passage cited from Chitty on Contracts. Where a

*Bigge v.*  
*Parkinson, &c.*

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§ 4.

buyer buys a specific article; the maxim *caveat emptor* applies but where the buyer orders goods *to be supplied*, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions." The *second* question was whether by the particular terms of the contract an implied warranty was excluded by the express warranty that the stores should pass survey, and the Court decided that it was not excluded.

To a similar effect is the decision of the Common Pleas Division in a County Court Appeal arising out of a contract by a wholesale importer to send to the defendant, who is a retail provision dealer in London, weekly supplies of Ostend rabbits. The effect of the decision is that there was an implied term that the goods should be so supplied as, in the ordinary course of transit, to reach the buyer in a condition capable of being retailed by him as wholesome food (*Beer v. Walker*, 25 W.R. 880).

I have hitherto considered the implied undertaking as to fitness, by the manufacturer or dealer supplying goods for a particular purpose, as confined to executory contracts. In regard to the manufacturer, there is, even in regard to finished articles specifically selected by the buyer, an implied warranty that the article is reasonably fit for use, as the thing it professes to be. Thus in *Shepherd v. Pybus* (3 M. & G. 868), it was decided in regard to the purchase of a barge from the builder, that there was an implied warranty of the barge to be fit for use generally as a barge, though not that it was fit for a particular object which was not in the contract. In *Jones v. Bright*, 5 Bing. 533, the question arose upon copper sheathing selected by the purchaser. The distinction between a manufacturer and dealer was pointed out in that case by Park, J. (p. 546); but that distinction was really immaterial to the decision, because in the view taken by all the other judges, the use to be made of the copper was held to be part of the contract. That it is, in such a case, immaterial whether the article was furnished by the manufacturer or by a dealer, appears by the



opinions of the judges in *Brown v. Edgington* (2 M. & G. 279, 292, 293). But the distinction may, notwithstanding, be material in the case of sale of goods selected in *specie* by the purchaser, without any express statement as to the use to be made of the goods. It is obvious that in such a case the purchaser does rely to some extent upon the skill of the manufacturer. And to this effect *Shepherd v. Pybus* and *Jones v. Bright* may fairly be cited as authorities.

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§ 4.

This implied warranty of the manufacturer does not extend in favour of a sub-purchaser not a party to the contract with him (*Longmaid v. Holliday*, 6 Exch. 761). To make out a liability in such a case something must be shown amounting to fraud (*i.e.* intentional wrong) on the part of the manufacturer; or else there must be an absolute duty incumbent on the manufacturer to use skill or care in the manufacture; and this may possibly be the case in regard to articles which are known to be highly dangerous if not skilfully or carefully manufactured. On these points I refer to *Langridge v. Levy* and *George v. Skivington*, and the remarks on these cases in my book on Negligence (2nd ed. p. 178); and to the more recent case of *Parry v. Smith*, 4 C. P. D. 325, 327.

I must here mention another exceptional class of cases where there is an implied warranty by the custom of a particular trade, as in *Jones v. Bowden*, 4 Taunt. 847. This is only an instance of the general principle importing into contracts the usage of the trade, where lawful and established by evidence.

There is a warranty imposed by statute, 25 & 26 Vict. c. 88, secs. 19 & 20, on the seller of articles with a trade mark, or descriptive label, to the effect that in the former case the trade mark is genuine and in the latter that the description is true.

Warranty by statute.

The "Sale of Food and Drugs Act, 1875," commonly known as the Adulteration Act (38 & 39 Vict. c. 63) contains (sec. 27) express penal clauses, against giving false warranties in writing or supplying false labels.

Penalties for false warranties.

The only question as to warranty of title on the sale of goods is whether, *primâ facie*, by the mere act of selling a specific ascertained chattel, the vendor impliedly states that the chattel is his.

Implied warranty of title.

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§ 4.

Notwithstanding the statements to the contrary in some of the ancient authorities, and some dicta of Baron Parke in the case of *Morley v. Attenborough*, 3 Ex. 500; the modern rule and practice appears to be well settled that, *prima facie*, there is such an implied statement, and therefore a warranty by the vendor that he is the owner; but that it is open to show by the situation of the parties and the circumstances of the sale, the intention to be only that the vendor should transfer such interest as he had.

This is in effect the result deduced by Mr. Benjamin on a careful and accurate review of the authorities; and in the conclusion, combining the result of this analysis with that of the learned author's own judgment and experience, I can only express my entire concurrence.

The more recent cases, which give the key to the rest, are *Eichholz v. Banister*, 17 C. B. N. S. 708; and *Bagueley v. Hawley*, L. R. 2 C. P. 625. The rule stated is perfectly consistent with the decision in *Morley v. Attenborough*, 3 Ex. 500; which merely amounted to this, that in the public sale by a pawnbroker of unredeemed pledges without an express warranty, no further warranty or statement was implied than that the things had been pledged to him and were unredeemed. It is also perfectly consistent with the cases relating to patents, *Hall v. Conder*, 2 C. B. N. S. 22, and *Smith v. Neale*, 2 C. B. N. S. 67. In *Bagueley v. Hawley*, Mr. Justice Willes (L. R. 2 C. P. 629), remarked that he agreed with the jury that the thing which the defendant sold was a boiler, and not a lawsuit. But in the sale of a patent every one knows that the right to a lawsuit is exactly that which is bought.

I have here, for convenience, included warranty of title amongst the stipulations collateral. It is easy to see that, if the question arises from an absolute want of title in the vendor, it goes to the essence of the contract. But here, as in every other case of a representation by one party acted on by the other, it is in the option of the latter to adopt the transaction so far as it can be adopted and to treat the representation as a collateral matter entitling him to damages.

## PART VI.

### VENDOR'S RIGHTS REMAINING IN THE GOODS, NOTWITHSTANDING THE TRANSFER OF THE PROPERTY BY THE SALE, AND QUALIFYING THE RIGHT OF PROPERTY SO TRANSFERRED; AND HEREIN OF TRANSFER OF POSSESSION AND *TRANSITUS*.

FROM what has been said as to the effect of the contract of sale in passing the property, it appears (see p. 226, *ante*) that the transfer of property (in the general sense in which the word "property" is used when I speak of its transfer by the sale, or intention of the contract itself), is not necessarily coincident in time either with the payment of the price by or with the *transfer of the possession* of the goods to the vendee. And if the transfer of property takes place before payment of the price and before transfer of the *possession*, the "property" so transferred is subject to certain rights of the vendor (in the nature of a special property or right in security), growing out of his original ownership, and remaining in him until either the whole price has been paid, or the goods have been delivered into the possession of the buyer.

These rights, commonly known as "Vendor's rights," include the right to retain the goods until payment of the whole price; but they are larger than a mere right of retention or lien, and extend in many cases to a right to resell the goods (Blackburn, p. 320: *Bloxam v. Sanders*, 4 B. & C. 941).

In the case where the buyer has become insolvent, the vendor's right extends to a right to sell the goods in order to realize his debt (*Bloxam v. Sanders*, 4 B. & C. 941, *Bloxam v. Morley*, 4 B. & C. 951).

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Transfer of possession may be deferred notwithstanding transfer of property.

Vendor's rights in such a case.

Buyer insolvent.

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Not insolvent,  
but in default.

Where the buyer is not insolvent but is in default:—If before the attempted resale he makes tender of the price, the vendor's right is at an end, and the resale is void (*Martindale v. Smith*, 1 Q. B. 389); but if no tender is made, the vendor may resell;—the buyer having no immediate right of possession and therefore being unable to complain of the act as a wrongful conversion of the goods (*Milgate v. Kebble*, 3 M. & G. 1000; *Lord v. Price*, L. R. 9 Ex. 54). If, however the resale was, in the circumstances, an unreasonable act, there seems nothing to prevent the buyer from bringing an action against his vendor for damages.

Buyer in default  
(whether insol-  
vent or not).

Without inten-  
tion wholly to  
refuse  
performance.

Where the buyer is in default, whether insolvent or not, it is also necessary to make the following distinction.

If he has made default, *not* intending wholly to refuse performance of the contract, the default does not give the vendor any right to treat the contract as rescinded (*Greaves v. Tyler*, 1 Salk. 113; *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee*, L. R. 1 P. C. Ap. 127).

With the inten-  
tion wholly to  
refuse per-  
formance.

In such case the  
vendor may  
resell as  
accepting  
rescission.

But if the buyer refuses to pay the price or take away the goods with the intention of wholly refusing to perform his contract; this may be construed as an offer to rescind the bargain giving the vendor an option to treat it as rescinded. In this case, if the vendor resells, it may be in the exercise of this option, and if so there is an end of the matter (*Langfort v. Tyler*, 1 Salk. 113; *Hore v. Milner*, Peake, 42 n.). I refer also to the cases (further explained in the sequel, p. 362, *post*) in which an insolvent buyer declines the goods, impliedly offering to rescind:—*Barwick* (1 Str. 165); *Salte v. Field* (5 T. R. 211); *Bartram v. Farebrother* (4 Bing. 579).

Or he may  
resell with the  
intention to  
hold the buyer  
accountable for  
loss; in which  
case he must  
account for  
excess if any.

If, the buyer being in default, the vendor resells, the case not being one in which the contract is rescinded;—that is to say, if either the buyer has made no offer of rescission, or the seller notwithstanding such offer resells with the intention of exercising his rights as unpaid vendor, and still holding the buyer to his bargain—if on such resale there is a deficiency, the vendor may recover the amount of such deficiency in an action of damages for breach of the contract (*Maclean v. Dunn*, 4 Bing. 122; *Acebal v. Levy*, 10 Bing. 376, 384). But if on such resale there is an excess over the price bargained for,

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the vendor is accountable for such excess to the purchaser's estate. This seems the result of the cases *Valpy v. Oakeley* (16 Q. B. 941) and *Griffiths v. Perry* (1 E. & E. 680), which decided that the sale in such a case was a breach of contract in which an action lay; the damages being measured by the excess (if any) of the market price at the time of sale over the contract price, and being merely nominal if there was no such excess.

If the primary sale has been made under an express condition reserving to the vendor a power of resale on default, this has been construed as a sale subject to a condition of defeasance, and the seller having made such a contract and reselling on default is presumed to have sold under the condition, and so rescinded the bargain (*Hagedorn v. Laing*, 6 Taunt. 162; *Lamond v. Duvall*, 9 Q. B. 1030). To avoid this result, there is, in conditions of sale by auction, not unfrequently added to the condition for resale, a further stipulation that the resale shall not annul the contract but that damages may be recoverable notwithstanding.

Express condition reserving power of resale on default.

The vendor's rights exist, speaking generally, independently of the express terms of the contract of sale. If, however, either by the terms of the contract, or by a collateral agreement, credit is given, and unless there is an express agreement, or usage in the particular trade (*Field v. Lelean*, 6 H. & N. 617), that possession is nevertheless to be retained by the buyer, the vendor's rights are in *abeyance* during the currency of the credit so that the buyer, not being insolvent, may demand possession of the goods.

Vendor's rights are in abeyance while credit is running.

If the buyer, being still indebted to the vendor in respect of the price, becomes insolvent before the vendor has parted with possession, the rights of the latter revive (*Bloxam v. Sanders*, 4 B. & C. 941, 948; *Bloxam v. Morley*, 4 B. & C. 51; *Dixon v. Yates*, 5 B. & Ad. 313, 341; *Valpy v. Oakeley*, 3 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680; *Gunn v. Polkew*, *Vaughan & Co.*, L. R. 10 Ch. 491; and see, in the parallel case of an artificer's lien, *Ex parte Willoughby, in re Vestlake*, 16 Ch. D. 604). When I say *indebted*, I include the

But revive on buyer's insolvency if possession has not been transferred.

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case where payment has been made by a bill of exchange, on which the vendor, as well as the buyer, is liable, or of which the vendor is himself the holder. That a bill of exchange should be taken as *payment to all intents and purposes* is quite exceptional; but that *may* happen, as for instance in the case of *Cowasjee v. Thomson* (5 Moo. P. C. 165), where the buyer having, under the contract *the option* of receiving payment in cash, *elected* to take payment in a bill of exchange for the sake of saving the discount. This was held to be equivalent to a payment in cash, and the vendor's right was accordingly considered at an end. A vendor who is paid by the buyer's promissory note, which he negotiates *without making himself liable*, is paid to all intents and purposes (*Bunney v. Poyntz*, 4 B. & A. 568).

Where no insolvency the question does not practically arise.

It is almost idle to speculate whether the vendor's rights revive on the expiry of the credit, *if there is no insolvency*. The credit is most commonly given by taking a bill of exchange or other absolute engagement of the buyer to pay at a fixed date; and non-payment on the expiry of the credit means, in such a transaction, either a renewal of the credit, or, in a mercantile sense, insolvency. If I had to give an opinion on the point, I should be inclined to think that if the possession has remained in the vendor without default on his part, everything would on the expiry of the credit without payment having been made, be exactly in the same position as if no credit had been given. Mr. Blackburn observes that the point has not been decided by the Court in banc, and must be considered as doubtful; but the *nisi prius* decision (*New v. Swain*, 1 Dans. & Loyd, 193, *Bunney v. Poyntz*, 4 B. & A. 568), and the *dicta* (*Bloxam v. Sanders*, 4 B. & C. 941), referred to by him, support the view above indicated.

Vendor's right holds good against sub-purchaser.

The vendor's rights hold good against a sub-purchaser (*McEwan v. Smith*, 2 H. & C. 309; *Dixon v. Yates*, *supra*), unless the former has led the latter to act on the belief that his right as vendor was waived or at an end. (See p. 187, *supra*. *Stoveld v. Hughes*, 14 East, 308; *Pearson v. Dawson*, E. B. & E. 445; *Knights v. Wiffen*, L. R. 5 Q. B. 660). And there is under the Factors Act, 1877 (40 & 41 Vict. c. 39, s. 4), a

statutory extension of this exception to every case where the vendee has obtained what are called the "documents of title" to the goods.

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If credit has not been given, the vendor is not, although the property has passed by the contract, bound to deliver the goods into the possession of the buyer except upon payment of the price as a condition precedent.

I have spoken (p. 329, *supra*) of the *transfer of possession* as that which, the price or part thereof remaining unpaid, determines the vendor's rights. I shall next enquire what are the *criteria* of this *transfer of possession* having taken place. Having done this, I shall consider the nature and effect of the proceeding called *stoppage in transitu*; whereby (the goods being *in transitu* and the buyer insolvent) the unpaid vendor who has parted with both property and possession is allowed to revert in himself the possession, and to a certain extent the property.

And first I enquire what are the species of facts which constitute *transfer of possession*.

In what does transfer of possession consist.

The word *possession* is a word of very flexible meaning. In a certain sense there is a *possession* in the buyer as soon as the property vests in him according to the contract. For from that moment, whatever possession the vendor has, he holds in the character of bailee for the other so far as is necessary to give effect to the latter's right of property. That this is the case by the theory of the law, appears by the circumstance that the buyer, not being in default, became entitled (by the old system of pleading), as soon as a right of property vested in him according to the contract, to bring against a third party who wrongfully converted the property, an action of *trover*, which was an action grounded on the plaintiff's *possession*. Again the buyer may be put in *possession* by the goods being delivered to a carrier for him, and this is in law considered such a possession as to *divest entirely* the *possession* of the vendor. But this again is said to be a *constructive* possession, and has been distinguished from *actual receipt* or *actual possession*, which is not considered to be vested in the buyer until the goods are in

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his warehouse. Here the legal distinctions end, although any one inclined to split hairs further, might say that this last is after all only a *constructive* possession, the actual possessor being the warehouseman who holds them as bailee for the owner. But for all practical purposes the possession of the owner having the goods warehoused for him, is actual possession.

The possession with which I am immediately concerned as transferred to the purchaser and thereby (generally) putting an end to the vendor's rights is a possession such as to *divest the possession* of the vendor, without regard to whether or not the conditions of "actual possession" or "actual receipt" by the buyer are satisfied. It is however very convenient here to refer generally to what has been already said in regard to "actual receipt" under the Statute of Frauds (pp. 180—195, *ante*), observing, that, although there cannot be *actual receipt* without possession, there may be possession without actual receipt.

Recapitulation  
of heads under  
which "actual  
receipt" is  
treated.

It will be remembered (see p. 180) that, in treating of actual receipt, I considered the subject under these heads:—

Where the goods (or part of them) are physically transferred.

- (a) From the immediate possession of the seller or his servants into that of the buyer or his servants:
- (b) From the immediate possession of the seller or his servants into that of a receiving agent of the buyer: and the more complex case where the goods are first delivered to a forwarding agent and then by him to a receiving agent, or where the forwarding agent himself becomes agent to keep the goods for the buyer.

And where the goods remain,

- (c) In the actual possession of a middleman, who from being the bailee of the vendor in respect of the goods, becomes the bailee of the buyer:
- (d) In the actual possession of the vendor himself who by some new arrangement with the buyer becomes his bailee in respect of the goods.

I shall now consider possession (whether actual or not) under



the same heads, so that after what has been already said in regard to actual possession it will only be necessary to point out the circumstances in which *possession* would be transferred to the buyer although the facts might not amount to *actual* possession by him.

(a) *Transfer from seller to buyer immediately.*—In regard to this head little remains to be added, the *transfer of possession* to the buyer in such a case being identical with the *actual receipt* by him. (a) Transfer of possession where delivery is immediately from seller to buyer.

I here refer to the remark already made (p. 233, *ante*) to the effect that delivery may be of a conditional character, and observe that where the same act *primâ facie* operates both as an appropriation and as a transfer of possession, but the intention to make the appropriation conditional is proved, the transfer of possession as well as of the property will only take effect subject to the condition. In all cases, to effect a transfer of possession there must be the concurring intention of the one to give and of the other to take possession, and if the act which *primâ facie* is one of taking possession is clearly shown to be done with a different intention; or if the authority given by the owner to the person who does the act is clearly limited, so as not to authorise the taking possession on his behalf, the possession is not transferred (*James v. Griffin*, 1 M. & W. 20). Conditional delivery.

Where goods are delivered on board the buyer's own ship, the intention of the shipment may, as I have already shown, p. 249, *supra*, be conditional; it being within the presumed authority of the master of the ship, to accept the goods to be carried under a bill of lading for a person other than the ship-owner; and the taking of the bill of lading by the consignor to his own order being *primâ facie* evidence of the intention that the delivery of the goods on board the ship shall operate so as to reserve to him the *jus disponendi*. The effect therefore of taking the bill of lading in this form is that neither property nor possession is transferred to the buyer until the bill of lading is duly indorsed to him by the consignor with the intention of transferring the property. But where goods are delivered on board the buyer's own ship, and the bill of lading is taken to order of the buyer or assigns, the possession as well Shipment.

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as the property vests at once in the buyer, and the goods are to all intents and purposes actually received and at home in his hands (*Schotsmans v. Lancashire and Yorkshire Ry. Co.*, L. R. 2 Ch. 332). Whether a ship chartered by the buyer is to be considered for this purpose as his own ship depends on whether or not, upon the true construction of the charter-party, there is a demise of the ship to the buyer so as to give him the entire control of it and to make the master and crew his servants (see p. 350, *post*).

Delivery of goods on land to buyer's servants sent to fetch them.

The case is different where goods are carried by land and are delivered to the servants of the buyer into his own carts. There is in such a case no room for a presumption that the goods are taken by those sent to fetch them in any other capacity than as the servants of the buyer, or that his goods can be in the servants' possession as bailees for any person other than their own master.

(b) Delivery to buyer's agent : whether

warehouseman,

or carrier.

By sea.

(b) *Transfer to hands of buyer's agent.*—Under this head, although, as I have shown, there is, in my opinion, no “actual receipt” by the buyer until the goods are in the hands of his warehouseman, or a bailee having *pro hac vice* the character of his warehouseman; it is undoubted that the delivery to a forwarding agent does, as a general rule, operate as a transfer of possession to the buyer (*Ellis v. Hunt*, 3 T. R. 464, 469, and see p. 278, *supra*, and cases there cited).

In the case of a shipment, there may, in manner already mentioned, be a reservation by the consignor of the *jus disponendi*, evidenced (generally) by the form and mode of dealing with the bill of lading, controlling the effect of the shipment both as a transfer of the property and the possession in the goods; but if the bill of lading is taken to the order of the consignee, or indorsed in due course to him, then the shipment operates as a transfer of the possession as well as of the property to the consignee. In default of and until a bill of lading is signed the intention with which the goods are put on board may be shown by the lighterman's receipt (*Craven v. Ryder*, 6 Taunt. 433). And until the signing of the bill of lading the presumption appears to be against the shipper's intention to part with the possession (*Falke v. Fletcher*, 13 C. B. (N. S.), 400). The case

of *Ruck v. Hatfield* (5 B. & Ald. 632), shows how the effect of the bill of lading itself may, as between the parties to it, be controlled by evidence.

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If the shipment is made in the first instance with reservation by the shipper of the *jus disponendi*, by taking the bill of lading to his own order, the indorsement of the bill of lading by him, with the intention to transfer the property (whether generally or by way of giving a right in security) in the goods, operates as an immediate transfer of the possession as well as of the property; and the same is the case with every indorsement of the bill of lading by a person having a property in the goods and with the intention of transferring that property, or of carving out of it a property in the nature of a right in security. The case differs from that of goods in a warehouse in this respect, that "where goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods (Blackburn, p. 297, 8). Besides this reason in the nature of the case, and probably resulting from it, there is, as Mr. Blackburn further observes, the cogent argument that the operation and effect of a bill of lading as above described has been established by inveterate custom, and forms part of the law-merchant.

Transfer of possession by indorsement and delivery of the bill of lading.

Although the rule as to the transference of possession immediately by the endorsement and delivery of the bill of lading doubtless has its origin in the physical exigency above referred to, it would be obviously most inconvenient if this operation of a bill of lading were strictly limited to the time during which the goods were at sea and should cease immediately and at all events upon the goods being landed. And it is now authoritatively laid down that the bill of lading remains in force as an instrument capable of at once transferring the property and possession when indorsed and delivered with that intent, until delivery of the possession has been made to a person having right under the bill of lading to

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receive the goods. In the case of *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661, 4 H. L. 317, the goods had been landed at a sufferance wharf subject to the shipowner's lien for freight pursuant to the Merchant Shipping Amendment Act, 1884 (25 & 26 Vict. c. 63, s. 67), and the consignee subsequently obtained an advance from the plaintiff and indorsed the bill of lading to him by way of pledge. The bill of lading indorsed was one of a set drawn (as usual) in triplicate, and the second of the set was afterwards sent to the pledgee at his request. The consignee afterwards fraudulently obtained from the defendant an advance on security of the goods by endorsing to him the third of the set, which he had retained in his possession; and the defendant by means of this bill of lading, procured the goods to be transferred to his name and afterwards sold them. It was decided by the Court of Common Pleas, by a judgment unanimously affirmed both in the Exchequer Chamber and in the House of Lords, that the title of the plaintiff prevailed and that he was entitled to recover the proceeds or the value of the goods from the defendant.

Where, as is the usual practice, the bills of lading are drawn in sets of three, the indorsement for value of any one of the set gives a complete title to the indorsee to the property according to the intention of the transaction, and any subsequent indorsement for value of another of the set (which of course can only be done by a fraud on the first indorsee) merely gives a title to the right of property and possession in the goods subject to the rights of the first indorsee (*Meyerstein v. Barber*, *supra*, *Glyn Mills & Co. v. E. & W. I. Dock Co.*, 5 Q. B. D. 129, and 6 Q. B. D. 499).

*Glyn & Co. v.  
E. & W. I.  
Dock Co.*

The case last cited was one of very special circumstances. C. & Co., merchants in London, being consignees and owners of a certain cargo shipped from abroad, obtain an advance from their bankers (Glyn & Co.) upon indorsement and delivery of the bill of lading, the transaction being accompanied by a *memorandum* reserving to the debtors a power, which was somewhat variously construed, of dealing with the goods by the permission or consent of the creditor. The goods on arrival were warehoused with the E. & W. I. Dock Co. under an arrangement

which Brett, L.J., in the Court of Appeal, construed as merely equivalent to a warehousing of goods under 25 & 26 Vict. c. 63, secs. 66—77, but which Bramwell and Baggallay, L.JJ., construed as a warehousing *by the directions of C. & Co.* with the consent of the captain under a stipulation for protecting his lien. At all events Glyn & Co. did not in any way interfere, and the goods were, upon the production by C. & Co. to the Dock Co. of the "second" part of the set of three of the bills of lading, entered in the warehouse books to the order of C. & Co. Ultimately they were delivered to a purchaser on the delivery order of C. & Co. The action was brought by Messrs. Glyn & Co. against the Dock Co. for wrongful conversion in so delivering. Field, J., held that the defendants were liable. Without deciding whether the captain might have been justified in delivering upon the "second" bill of lading, he held that the defendants were as warehousemen mere bailees for C. & Co. and had no better title than they. He considered the rule laid down in *Meyerstein v. Barber* to be quite consistent with the power of persons who rely on these documents to protect themselves from fraud; for as the bills of a set are marked *first, second, third*, and as the *first* is that usually sent to the consignee and dealt with in transactions for value, a prudent person when asked to treat the second as a document of title to the goods would require the *first* to be produced or accounted for. This decision was reversed on appeal by Lords Justices Bramwell and Baggallay against the dissent of Lord Justice Brett. The judgment of the majority proceeded on several grounds, but that principally, and concurrently, relied on, was that Messrs. Glyn & Co. by their conduct *held out* C. & Co. as the owners of the goods.

An important question of law on which, in this case, Lords Justices Brett and Bramwell pronounce diversely, was as to the nature of the right in security held by the indorsee of the bill of lading, Lord Justice Brett holding that he has the entire *legal property* subject only to an *equity* or personal claim between him and the debtor; Lord Justice Bramwell holding that he has only a *special property* like a mere pledgee of goods in bodily possession of them. The question is, what is the intention of the transaction, and the authorities seem strongly to favour the view that, *primâ facie* at least, the indorsee is in

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the position of a *mortgagee* as distinguished from a *mortpledgee* (see p. 42, *supra*).

Another important question of law discussed in this case was as to whether the master of a ship will be exonerated by delivering the goods on any of the set of bills of lading being presented to him, without inquiry as to conflicting titles ; and if so, whether the warehouseman of goods landed on captain's entry under 25 & 26 Vict. c. 63 will be exonerated in a similar manner. The answer to the first of these questions has been authoritatively laid down in the affirmative by Dr. Lushington in the *Tigrow* (32 L. J. Adm. 97). Upon that question Field, J., in the case of *Glyn & Co.*, thinks it unnecessary to pronounce an opinion. Lord Justice Brett (6 Q. B. D. 488) respectfully differs from what he calls the *dictum* of Dr. Lushington. Lord Justice Bramwell forcibly argued (p. 492) that the proposition has more than the authority of a dictum, and Lord Justice Baggallay (p. 504) adopts the more guarded suggestion of Lord Westbury (see L. R. 4 H. L. 336) that the shipowner, who is ignorant of any previous dealing with the bill of lading, may be justified in delivering the goods to the party presenting the ostensible *indicia* of ownership. On the second point I think the balance of authority is to the effect that the warehouseman, at all events, is not exonerated without reference to the ownership of the person so claiming delivery. This is the opinion of Field, J. It is the opinion of Lord Justice Brett, and the reasons he gives (6 Q. B. D. 484—5) upon the construction of the statute (25 & 26 Vict. c. 63, secs. 66—77) seem conclusive. The point is not dealt with by Lord Justice Bramwell, and is not fully dealt with by Lord Justice Baggallay. It may be observed, however, that the latter (as reported p. 506) misquotes the statute by saying that the warehouseman is directed in the event of a sale to hold the surplus of the proceeds for "the holder of the bill of lading," whereas the words are, as correctly quoted by Lord Justice Brett (p. 485), "the owner of the goods."

Where goods were consigned on board the consignee's own ship *freight free*, and the consignors had reserved the *jus disponendi* by taking the bill of lading to their own order,—the captain having signed them in this form in accordance with his

neral authority and not having notice of a change of ownership in the vessel,—a charge claimed in name of freight by consignees of the consignee's right in the ship was held not to prevail against the consignors' right (*Mercantile Bank v. Ladstone*, L. R. 3 Ex. 233). In some of the judgments the consignors' right is incorrectly described as a right of stoppage *in transitu*.

In the case of land carriage, the delivery to a carrier or forwarding agent, to convey the goods to their destination according to the contract of sale, operates as a transfer of the possession to the buyer; the carrier being (in the absence of special contract to the contrary) considered in law as bailee for the person to whom and not for whom the goods are sent; the person to whom they are sent taking the risk of the goods, and being the person to sue the carrier in case of loss. The goods are considered in law as sold and delivered, and the vendor's rights, except in the case (presently to be dealt with) of the buyer being insolvent and the seller stopping the goods *in transitu*, are at an end. By land.

(c) *By attornment of the warehouseman*.—Having under the last head (b), and somewhat by anticipation, dealt with the case where, the goods being in the actual possession of the master of a ship, the possession is transferred by the indorsement of the bill of lading: and having shown that where the goods are in the hands of a carrier by land, the *possession* is, as a general rule, transferred by the delivery to the carrier as the buyer's agent; there remains only to deal with the case of goods remaining in the possession of an agent in the character of a warehouseman. In this case the *criteria* for *transfer of possession* so as to divest the vendor's rights are exactly the same as those for *actual receipt*, which I have considered pp. 186—194, *supra*) under the corresponding head in regard to the Statute of Frauds. To the cases cited under that head, here add for further illustration the case of *Lackington v. Therton*, 8 Scott, N. S. 38. Timber which had been sold by A. to B. and paid for, remained lying at the West Indian Docks and warehoused in A.'s name. It was then sold by B. to C., B.

Goods remaining  
in possession of  
warehouseman.

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giving C. a delivery order, and taking from him a bill for the price. C. demanded the timber at the docks, but the Dock Company declined to act on B.'s order, requiring that of A. Before A.'s order was obtained by C., and before the bill came to maturity, C. became bankrupt. B. subsequently obtained the timber from the docks on a delivery order from A. dated prior to the sale to C. The action was brought by C.'s assignee in bankruptcy to recover the value of the timber. It was held that, as the Dock Company were not bound to obey the order of B. presented to them, they were never bound to become—and they never in fact became—C.'s agents (or, in the language used in some cases they never *attorned* or became bound to *attorn* to C.). Consequently the *possession* had never been transferred to C., and the vendor's right in security (in the case incorrectly termed a right to stop *in transitu*) was not determined. There was no estoppel, as it did not appear that C. in any way altered his position in consequence of the delivery order given him by B. He never paid for the goods, but had given a bill which turned out waste paper.

Goods remaining  
in actual  
custody of  
vendor.

(d) *Goods remaining in actual custody of vendor.*—In the cases under this head it would be probably accurate to say that transfer of possession and actual receipt are effected *uno actu*.

The goods being still, however, under the actual physical control of the buyer, it does not follow, although the possession, and even the actual receipt, has, in law, vested in the buyer, that the seller is so divested as to have lost his rights of special property as vendor. Where the vendor was also warehouseman of the goods sold, and had given delivery orders for them to the purchaser, taking bills in payment of the price, and the purchaser became insolvent during the currency of the credit, it has been held that such of the goods as still remained in the vendor's warehouse were subject to his rights as vendor and could be retained by him accordingly (*Grice v. Richardson*, in the Privy Council, 3 App. Ca. 319; *Miles v. Gorton*, 2 G. & M. 504; *Townley v. Crump*, 4 Ad. & E. 58). In the case in the Privy Council it was said that "the vendor's lien revived upon the insolvency of the vendee." It may be noted however that, in such a case, just as in the simple case of credit



being given without any contract of bailment being entered into, the right arises from the continuing possession of the vendor, and does not, as in the case of stoppage *in transitu* to be presently mentioned, consist in a right to *revest* a possession which has been wholly divested.

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In the case of *Gunn v. Bolckow, Vaughan & Co.*, reported L. R. 10 Ch. 491, there was an attempt to set up against the vendor's rights, the right of a third party, constituted by way of pledge by delivery of certificates to the effect that certain iron manufactured by the defendants (vendors) under contract with A. & Co. were stacked on the premises of the vendors ready for shipment. There was alleged a custom of trade by which such certificates were considered negotiable documents of title to the goods. But it was, of course, impossible to give any legal effect to such an alleged custom (there being no statement as in the case of *Merchant Banking Co., &c.*, p. 69, *supra*, where the warrant went on to describe the goods as deliverable (f.o.b.) to or assigns by indorsement); and the case simply resolved itself into one where the vendor had with the assent of the buyer, appropriated specific goods to the contract so that the property had passed, but the possession remained with the vendor, and, the buyer having become insolvent during the currency of the credit, the vendor's right of lien revived.

*Gunn v.  
Bolckow, &c.*

In the case above referred to, *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (5 Ch. D. 205), the defendants, who are manufacturers of steel goods, had agreed to make and sell to Messrs. Smith & Co. steel rails to be delivered free on board ships at Liverpool. The payment was to be partly in cash and partly by bills. Several parcels of steel rails having been manufactured and paid for partly in cash and partly by bills under this contract, Messrs. Smith & Co. stopped payment; the "warrants" having been in the meantime indorsed to the plaintiffs for value. There were two parcels of rails in question. One of these had been taken by the London and North-Western Railway to Liverpool and the company had advised the purchasers of its arrival waiting their orders, and that the company held the rails as warehousemen and not as carriers. Now as by the original contract the rails were to be

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at the purchaser's disposal at Liverpool there seems no question that those which were thus warehoused on the railway company's premises at Liverpool were both completely delivered and at the end of their journey.

The question as to the remaining parcel was one of great difficulty. This parcel remained stacked on the premises of the vendors, who had given for it, in exchange for an equivalent in cash and bills of exchange, a "warrant" in this form:—

"The undermentioned iron will not be delivered to any party but the holder of this warrant.

*"Phoenix Bessemer Steel Co., Limited.*

"No. 88.

Dec. 19, 1874.

"Stacked at the works of the *Phoenix Bessemer Steel Co., The Ickles, Sheffield.*

"Warrant for 403 tons 2 qrs. 9 lbs. steel rails. Iron deliverable (f.o.b.) to Messrs. Gilead A. Smith & Co., of London, or to their assigns by indorsement hereon."

Evidence as to the usage of the iron trade was adduced, to the effect that warrants in the form signed by the defendant company had been known since 1846, and had been in general use in the trade since 1866, that the form had been settled by counsel, Mr. (afterwards C. J.) Bovill and Mr. Lloyd, that such warrants were for the purpose of distinguishing the goods as being stacked at the warehouse or wharf of the manufacturer, and that when they stated they were deliverable to the purchasers or their assigns by indorsement, it was understood in the trade that they were to be free from any vendor's lien for unpaid purchase-money, that they passed from hand to hand by indorsement, and conveyed to the holder a title to the goods, and that this was so well known that no notice was deemed necessary to be given by the holder to the maker of the warrant.

The Master of the Rolls (Jessel) decided that the vendor could not claim a lien against the holders of the warrants. The ground of this judgment sufficiently appears from the following passage (5 Ch. D. p. 265):—"We must consider it on the evidence as an established custom that any man who gives this

warrant understands that it shall pass from hand to hand for value by indorsement, and that the indorsee is to have the goods free from any vendor's claim for purchase-money. He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape he tells all the trade that they may safely deal on the faith of that warrant, and whether or not it becomes a negotiable instrument at common law as distinct from equity, is, to my mind, utterly immaterial. That is the custom, and as the man who issues such a warrant knows that custom, it appears to me that the *Phoenix Bessemer Company* have issued them exactly as if they had said they were to be deliverable according to the custom of the iron trade, that is to say, to be deliverable 'free from any vendor's lien,' they being the vendors—to Messrs. Smith & Co. or their assigns by indorsement. If those words were inserted, can anybody doubt that the Phoenix Bessemer Company by issuing the warrant in that form would be precluded in equity from afterwards alleging that they were unpaid vendors? But having given it as a statement on the face of the warrant that the holder for value by indorsement would have the goods free from the lien, and having given the warrant for the purpose of its being so dealt with, I think it is clear on general principles of equity that such a defence could not be set up; and I say in this particular case it is clear to my mind that they did give it for the purpose of being so dealt with."

This judgment is, in effect, that as between the vendors and the holders of the warrant, the former are precluded on the equitable principle of representation which I have already discussed (p. 62, *et seq.*, *supra*) from setting up their lien. But it may be observed that if it is the law, as appears to be the result of the cases of *Miles v. Gorton* and *Grice v. Richardson*, that the mere fact of the goods being warehoused for the purchaser on the premises of the vendor does not constitute an abandonment of his lien by the vendor, it puts a great strain on the terms of the warrant in question to say that, by the aid of any usage, it is capable of being construed as a statement or representation that the vendor's lien is at an end, or that the vendor has no lien.

In the arguments of the last mentioned case there is

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mentioned a decision of the Common Pleas Division in *Furmeloe v. Bain*, reported 1 C. P. D. 445. The defendant having contracted with B. & Co. for the sale to them of a certain quantity of zinc gave them a document in the following terms:—"We hereby undertake to deliver to your order indorsed hereon 25 tons merchantable sheet zinc, off your contract of this date," and this was indorsed accordingly to a sub-purchaser. B. & Co. having failed, the question arose between the indorsee and the vendor claiming to withhold delivery; and the above-mentioned documents was pleaded and argued to be a representation by the vendors, intended by them to affect the sub-purchaser, that the goods were the property of B. & Co., free from any claim of lien by the original vendors. But the Common Pleas Division (Brett, J., Archibald, J. and Lindley, J.), held that (in the absence of any mercantile usage to import such a meaning into the document) the document could not be construed as containing a representation of any such fact; and, as an undertaking, it could give the indorsee no higher right than the original purchaser had.

Factors Act,  
1877; see  
p. 373, *post*.

It is to be observed that the cases discussed in the last pages arose out of transactions before the last of the series of Factors Acts, which was passed in 1877. But I shall reserve consideration of the effect of the Act of 1877 here mentioned in defeating the vendor's rights until I have treated of the doctrine of stoppage *in transitu*, with which this effect is intimately connected.

Delivery to  
buyer as bailee  
for a special  
purpose.

I may here observe that the actual delivery of the chattel to the buyer as bailee for a special purpose is not such a transfer of possession as to put an end to the vendor's rights (*Tempest v. Fitzgerald*, 3 B. & Ald. 680, 684). In the case here cited a horse purchased for ready money and not paid for, was lent by the vendor to the buyer to ride. The decision was upon the question of actual receipt under the Statute of Frauds, but was based on the view that the vendor's rights were not determined. The case was the converse of *Marvin v. Wallis*, 6 E. & B. 726 (p. 192, *ante*), in which Erle, J., intimated an opinion that the lien of the vendor had been given up, and is similar in principle to *Reeves v. Capper*, 5 Bing. N. C. p. 136 (p. 41, *ante*), in which it was held that the right of a pledgee was not lost, where there

was an agreement under which a pledgor had the immediate custody of the pawn (a ship's chronometer) given him for a special purpose.

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I next consider the effect of delivery of a part of the goods, and whether such delivery divests the vendor's lien in respect of the remainder.

Delivery of part, does it affect the vendor's lien as to remainder?

The principle has been stated to be to the effect that, where there is a delivery of part with the intention and as part of an act of delivery of the whole, then the possession of the whole is transferred on the commencement of the delivery; but if part is delivered with an intent to separate that part from the rest, it is not an inchoate delivery of the whole so as to divest the vendor's rights.

The latter part of the proposition so stated is undoubtedly true, but it is not by any means so clear that the converse proposition holds good in all cases; and, as Mr. Benjamin acutely observes (3rd ed., p. 666), "no case has been met with where the delivery of part has been held to constitute a delivery of the remainder when kept in the vendor's own custody." And following out the suggestions of the same author, I observe that, where the goods are in the hands of a third party, the delivery to the purchaser of part of the goods *as part* of an act of delivery of the whole, necessarily implies that the third party (if a warehouseman) has *attorned* to the purchaser as his bailee, and (if in the first instance a carrier) that he has changed that character into that of what I may call a *quasi*-warehouseman, so that the transit is ended. There is nothing therefore to lead to the inference that, where part of the goods remain in the actual custody of the vendor, although delivery of the goods has commenced and is going on continuously, there is any abandonment of the vendor's lien in respect of the part so remaining in his actual custody. In the case of a shipowner or carrier, who has not been settled with for his entire freight or charges, the presumption has been decided to be that he intends to retain the rest of the goods subject to his lien; and that such part delivery is not intended to operate, and therefore does not operate, as a delivery of the whole.

The following cases will be found to bear out the propositions

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above stated in regard to the intention and effect of a partial delivery:—*Slubey v. Heyward* (1795), 2 H. Bl. 504; *Hammond v. Anderson* (1803), 1 B. & P. (N. R.) 69; *Crawshaw v. Eades* (1823), 1 B. & C. 181; *Simmonds v. Swift* (1826), 5 B. & C. 857; *Bunney v. Poyntz* (1833), 4 B. & Ad. 568; *Dixon v. Yates*, 5 B. & Ad. 313; *Tansley v. Turner* (1835), 2 Bing. N. C. 151; *Jones v. Jones* (1841), 8 M. & W. 431; *Whitehead v. Anderson*, 9 M. & W. 518; *Tanner v. Scovell* (1845), 14 M. & W. 28; *Bolton v. Lancashire and Yorkshire Ry. Co.*, L. R. 1 C. P. 431; *Ex parte Cooper, in re Maclaren*, 11 Ch. D. 68.

Stoppage  
in transitu.

Having, in relation to the vendor's rights, inquired into the criteria of transfer of possession, I now consider the nature and effect of the proceeding known as stoppage *in transitu*; whereby, as already mentioned, the unpaid vendor who has parted with both possession and property in goods, is enabled, on the buyer's insolvency and the goods being still *in transitu*, to revert in himself the possession, and to a certain extent, the property.

By whom  
competent.

Subject to the conditions that the goods are *in transitu*, and the buyer insolvent, the right of stoppage is competent, exactly as the vendor's rights already treated of, to the vendor who is wholly or partially unpaid; and notwithstanding that the buyer's acceptance to a bill of exchange has been taken in payment, or that credit has been given for the price in any other form (*Hodgson v. Loy*, 7 T. R. 440; *Edwards v. Brewer*, 2 M. & W. 375).

I here observe, in conformity with a remark already made, p. 238, *supra*, that in the case of consignments from abroad there is generally, between consignor and consignee, a true relation of vendor and purchaser, although the relation may be also one of principal and agent, or of persons having a joint interest.<sup>1</sup> And if the transaction is such that goods, originally the property of the consignors, become by the consignmen the property of the consignees, or even if only a special pro-

<sup>1</sup> See the observations of Mr. *Livingstone*, L. R. 5 H. L. 395, 400 and *per* Lord Chelmsford, p. 416.

perty and power of sale becomes vested in the latter, the relation of vendor and purchaser subsists for the purpose now in question, and the only question will be, whether, on the state of the accounts between them, the vendor is wholly or partially unpaid (*Kinloch v. Craig*, 3 T. R. 119; *Feize v. Wray*, 3 East, 96; *Newsom v. Thornton*, 6 East, 17; *Patten v. Thompson*, 5 M. & S. 350). On principle, the test whether the consignor is an unpaid vendor or not, would appear to be this, whether on striking out of the account any credit which may have been given to the consignee in respect of his unpaid or unmatured acceptances, there will appear a balance against him; and pending the ascertainment of the balance, the right of stoppage appears to be well exercised if there is good reason to believe that the balance will so turn out (see *Wood v. Jones*, 7 D. & R. 126).

I here purposely disregard *Vertue v. Jewel* (4 Camp. 31), a case which Mr. Blackburn fails satisfactorily to explain, and of which (as reported) Mr. Benjamin expressly questions the authority. The report is simply unintelligible; but I have an explanation to suggest. If, for the words "Burrows and Winn" (a few lines from the end of the report) we read "the plaintiffs," the report becomes at least intelligible; although the grounds of Lord Ellenborough's ruling remain unsatisfactory. That "Burrows and Winn" (whether mere pledgees, according to the view taken by Lord Ellenborough, or vendees, as they would be in the wide sense of the term above explained) should be described as "purchasers of the goods for a valuable consideration," is, in regard to the question of stoppage *in transitu*, obviously inappropriate. To have described *the plaintiffs*, who were indorsees of the bill of lading as "purchasers for valuable consideration" would have been a pertinent and conclusive observation.

*Vertue v. Jewel* disregarded, and why.

As a general rule, a mere surety for the buyer has not, as such, any right to stop *in transitu* (*Siffkin v. Wray*, 6 East, 371); but as Mr. Benjamin (doubtless justly) observes (p. 691, 3rd ed.), if a surety for an insolvent buyer should pay the vendor, he must have this right, by virtue of the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. By this section, which adopts a well-known rule of the Scotch

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law, it is enacted in effect, that a surety paying the debt of another shall be entitled to an assignment of all securities held by the creditor and to stand in the creditor's place in order to obtain indemnity from the principal debtor. The principle has been applied by the Master of the Rolls in *Imperial Bank v. London and St. Katherine Dock Co.* (5 Ch. D. 195).

Order of  
treating  
stoppage  
in transitu.

I shall now consider, *first*, what are the *criteria* of goods being *in transitu*; *secondly*, what act is necessary to constitute a stoppage; and *thirdly*, the legal effect of such act, and herein of the means (by transfer for value of the bill of lading) whereby such effect is wholly or partially defeated.

What constitutes  
*transitus*.

And *first*, I consider the *criteria* which constitute *transitus*.

Goods *in transitu* for the purpose now under consideration are necessarily in the hands of an *agent* for the *buyer*. They are, by the terms of the proposition already stated, no longer in the hands of the vendor or his agents; and, when they have arrived in the hands of the buyer *himself* or of persons in the capacity of his *servants*, the goods, although on a voyage, are considered as actually received, and not *in transitu*. For, as I elsewhere show (p. 184, *et seq.*, *ante*), *actual receipt* and the *end* of the *transitus* are, under such circumstances, coincident. So if goods are delivered on board the buyer's own ship, and there is nothing to show that the vendor reserved the *jus disponendi*:—or, in other words, that the delivery was to the master in the capacity, not of servant to the owner, but as agent for the shipper and his assigns under the bill of lading,—the goods are considered not only as in the possession of the buyer, but as being, to all intents and purposes, at home in his hands. In such a case no right of stoppage *in transitu* can arise (*Cowasjee v. Thomson*, 5 Moo. P. C. 165; *Schotsman v. Lancashire and Yorkshire Ry. Co.*, L. R. 2 Ch. 332).

Whether or not a ship chartered by the buyer is to be considered his own ship for this purpose, depends on the terms and construction of the charter-party: that is to say, whether the charter-party is intended to operate as a demise of the vessel, so as to give up to the charterers the entire control and disposal of the vessel and of the services of the master and



crew for the period of the demise; or whether the ultimate owners remain in possession of the vessel by the master and crew as their servants (Blackburn, p. 242; *Bohlingk v. Inglis*, 3 East, 381, 396; *Berndston v. Strang*, L. R. 4 Eq. 481, 3 Ch. Ap. 588; *Ex parte Rosevear China Clay Co., in re Cork*, 11 Ch. D. 560; see also *Sandeman v. Scurr*, L. R. 2 Q. B. 86).

Where the charter-party is a mere contract between the owners of the goods and the owner of the ship for the purpose of carriage, the goods on board will be *in transitu*, and it is the same thing if goods brought to be shipped to a port abroad are delivered at a home port to persons who are *shipping agents* for the buyer; and whether such *agents* ship the goods in their own ships or in ships hired by them is probably immaterial (*Rodger v. The Compté d'Escompte de Paris*, L. R. 2 P. C. Ap. 393).

The goods having been delivered into the hands of an agent for the buyer, the question is whether, at the moment of the exercise by the buyer of the right claimed by him of stopping the goods, the agent is an agent *for the purpose of forwarding the goods*, or for the purpose of keeping them at the disposal of the buyer; or briefly, whether he acts in the capacity of *carrier*, or of *warehouseman*.

Where the agent is a *carrier* or a *warehouseman*, acting, in either case, *simply in his proper capacity*, there is no question: but the difficulty begins where the agent alters his usual character.

For instance, where the agent, who is ordinarily a carrier, enters into a new contract of bailment with the buyer by storing the goods (with his consent) for him and at his disposal, the transit of the goods so warehoused by him is at an end (*Wentworth v. Outhwaite*, 10 M. & W. 436; *Rowe v. Pickford*, 8 Taunt. 83). And the same is the case where the goods have arrived in the hands of a packer, or any other agent, at a place which the buyer has made the repository of his goods (*Richardson v. Goss*, 3 B. & P. 119, 127; *Scott v. Pettit*, 3 B. & P. 469). That the assent of the buyer express or implied to the goods being so warehoused for him, is necessary in such circumstances to end the *transitus* appears from the cases of *Whitehead v. Anderson* (9 M. & W. 518), and *Bolton v. Lancashire and Yorkshire Ry. Co.* (L. R. 1 C. P. 431).

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Conversely, where a person, whose ordinary business is that of a *warehouseman*, receives goods to await shipment for a further destination *under the buyer's original order*, the goods are still *in transitu* (*Smith v. Goss*, 1 Camp. 282; *Coates v. Railton*, 6 B. & C. 422). So in the case of a wharfinger undertaking the conveyance of goods ashore in lighters (*Jackson v. Nicholls*, 5 Bing. N. C. 518).

Critical question whether arrived only at a stage of their journey or waiting orders to start on a new journey.

The critical cases are those in which the goods, though intended for a market elsewhere, are, for the moment, stationary in the hands of the agent; and the question in such a case is, whether they have simply arrived in the agent's hands at a stage of their journey, or whether they are there at the disposal of the buyer and waiting his further orders. As an instructive one for illustrating the principle, I shall cite the case of *Dixon v. Baldwin*, which came before the King's Bench in 1804, and is reported, 5 East, 175.

*Dixon v. Baldwin.*

The facts of the case, so far as relates to the question of stoppage *in transitu*, were these:—The defendants, cotton merchants in Manchester, were in the habit of supplying goods on the orders of B. & Son, traders in London, and it was the course of dealing for the defendants to send such goods to M. & Co., agents at Hull, by whom the goods were shipped to Hamburg upon the orders of B. & Son. The order for the goods in question, which was similar to orders for the like goods in other cases, directed them to be “packed in bales marked G. S. (and a certain mark) for order, and to be forwarded to Messrs. M. & Sons, to be shipped for Hamburg as usual.” The goods were sent by the defendants to Hull, made up and marked as directed. On the insolvency of B. & Son, the goods were stopped by the defendants in the hands of M. & Co., and one of the questions in the case was whether this was a good stoppage *in transitu*. One of the firm of M. & Co. who was examined as a witness stated (according to the report) “that at the time of the stoppage of the goods they held them for Messrs. B. & Son and at their disposal; that they accounted with B. & Son for the charges of the goods. And the witness described his business to be merely an *expeditor* agreeable to the directions of B. & Son; a stage, and mere instrument between buyer and seller. That he had no authority to sell the goods, and frequently

shipped them without seeing them. That the bales in question were to remain at his warehouse for the orders of B. & Son, and he had no other authority than to forward them. *That at the time the goods were stopped he was waiting for the orders of B. & Son; that he had shipped the four bales, expecting to receive such orders, and relanded them because none had arrived. That if the goods had been demanded by B. & Son before shipping he should have delivered them up to them.*" There were two questions, 1st, whether the *transitus* was at an end when the goods came to the hands of B. & Son, and 2ndly, if it was, whether a subsequent rescission of the sale and return of the goods by B. & Son on the eve of bankruptcy was a *bonâ fide* and valid act. Lord Ellenborough at the trial gave his opinion against the right of stoppage *in transitu* under the circumstances, but left the second question to the jury, upon which they found a verdict for the defendants.

A motion for a new trial came before the judges of the King's Bench, when Lord Ellenborough delivered an elaborate and instructive judgment. He commented on the cases of *Hunter v. Beale* (a case before Lord Mansfield in 1785) and *Stokes v. La Riviere* (3 T. R. 466, 3 East, 397), as follows:—"In *Hunter v. Beale* I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, *i.e.*, when they had arrived at the inn-keeper's, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a course of conveyance *from him*, in their way to Boston; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and ulterior destination. As to the case of *Stokes v. La Riviere*, the goods were claimed in suit by the plaintiff the seller from the defendants, to whom the goods were delivered to be forwarded to their (defendants') correspondents, Messrs. D. & Co. of Lisle; D. & Co. were therefore the consignees, and Lisle the ultimate place of destination. This, in respect of D. & Co., on whose rights the defendants stood, was clearly a case

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of transit not finished at the time the claim was made." He then, after referring to the cases of *Leeds v. Wright*, 2 Bos. & Pul. 320, and *Scott v. Pettit*, *ib.* 469, applied the principle of the cases commented on to the case in point, as follows :— "Here the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion to communicate to them another substantive destination and that without such orders they would have continued stationary." And he accordingly was of opinion that the *transitus* was at an end.

Grose, J., was of opinion that the right to stop *in transitu* was not at an end when the defendants took possession of the goods; but he agreed with the result arrived at on the second point, and the grounds on which he differed on the first point are not stated.

Lawrence, J., agreed with Lord Ellenborough that the goods had before their stoppage by the defendants arrived at their ultimate destination as between these parties, and consequently that they had no right to stop them as *in transitu*.

Le Blanc, J., agreed that the transit of the goods was at an end before they were stopped by the defendants. As between the buyer and seller they were arrived at the place of their destination when they got to the possession of M. & Co. at Hull; for till M. & Co. received directions from B. & Son they did not know where to send the goods. The warehouse of M. & Co. at Hull must therefore be considered as the warehouse of B. & Son.

Although it does not expressly appear from the report on what grounds Mr. J. Grose differed from the rest of the Court, it may be inferred that his opinion was based on the terms of the order for the goods directing them to be "packed, &c., and to be forwarded to Messrs. M. & Son, to be shipped for *Hamburgh* as usual." At first sight doubtless this direction would seem to bring the case within the principle of *Stokes v. La Riviere* quoted in the judgment of Lord Ellenborough. But, as I understand the judgments of the majority, they construed these words with reference to, and as not intended to control, the usual course of business as stated in the evidence, namely that the goods in the hands of M. & Co. should await

urther orders from B. & Son before being actually shipped. In the case of *Stokes v. La Riviere* the directions as to forwarding appear to have been more specific, and although the agent hesitated to send on the goods without further orders from his principal, there was no evidence of a course of business rendering such orders *necessary*. Any distinction between the facts of the two cases is however somewhat refined. As to the importance of the question whether the agent had or had not the authority of the vendee to forward without further orders, the reader may compare the cases of *Valpy v. Gibson*, 4 C. B. 837, where the agent had no such authority, with *Jackson v. Nicholls*, 5 Bing. N. C. 508, where, in regard to the particular goods in question, he had.

As further illustrations of the *criteria of transitus* I shall select some of the cases which have recently come before the Courts. Illustrations  
from recent  
decisions.

In *Ex parte Gibbes, In re Whitworth* (1 Ch. D. 101), cotton was shipped at Charleston under orders to be reshipped at New York for Liverpool, the bills of lading being taken to the order of Messrs. Whitworth & Co., who were manufacturers of cotton at Luddenden Foot. The invoice stated the cotton to be "consigned to order, for account and risk of the purchaser, Luddenden Foot." On the arrival of the cotton at Liverpool, the purchaser having accepted bills of exchange, got the bill of lading of the cotton which he sent (indorsed) to the manager of a railway company at Liverpool who paid the sea charges and got possession of the cotton which he put on the way to be carried to the purchaser at Luddenden Foot. The chief judge held that the *transitus* was at an end as soon as delivered at Liverpool to the manager of the railway company as the agent or the purchaser.

In a subsequent case, *In re Worsdell, Ex parte Barrow*, also decided by the Chief Judge Bacon (1877, 25 W. R. 466), goods were taken by ship directed to the purchaser at Falmouth. On arrival there they were taken possession of and warehoused by agents for the shipping company, whose custom it was to communicate with consignees of goods informing them of their arrival and subsequently to forward them according to instructions received from them. Before the instructions arrived the

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goods were stopped *in transitu*, and the chief judge held that the stoppage was good.

It will be observed that the two decisions last cited are entirely in accordance with the principles above laid down. In the former case (*Ex parte Gibbes, In re Whitworth*) the inference is that the cotton on arrival at Liverpool (and the bills of lading having come to the hands of Messrs. Whitworth) was at Messrs. Whitworth's entire disposal; and, although it was doubtless expected that the cotton would be ultimately sent to Messrs. Whitworth's manufactory at Luddenden Foot, there was nothing to have prevented them from sending it on what new journey they pleased; or from selling it at Liverpool. The cotton was indeed delivered at Liverpool to the railway company, who were carrying agents for the purchasers. But it was not delivered to them *as carrying agents with any privity of the vendors*; and so far as the vendors were concerned the directions as to the journey came to an end on the arrival at Liverpool, when it required new orders from the purchasers to set the cotton again in motion. In the other case (*In re Worsdell, Ex parte Barrow*) the goods when stopped were still in the possession (through sub-agents) of the carrying agents to whom they had been delivered by the vendors; and the only question could be whether the agent's character had been turned into that of *warehouseman* for the buyers. And this change as we shall see presently requires the concurring intention on the part of the buyer (p. 359, *post*).

*Ex parte  
Watson, In re  
Love.*

In the case of *Ex parte Watson, In re Love*, decided by the Court of Appeal in February, 1877 (5 Ch. D. 35), the facts were somewhat more complicated.

By agreement between Watson (a manufacturer in the north of England) and L. (a merchant in London engaged in trade with Shanghai in China) it was agreed that Watson should from time to time supply L. with goods, Watson drawing upon L. and L. accepting, bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. Watson was to have a lien upon the bills of lading and each shipment of goods in transit outwards, to secure the payment of the bills

of exchange given for that particular shipment. L. had verbally promised Watson that he would forthwith give R. notice of the agreement and its terms, but never did give such notice. The goods purchased under the agreement were sent by Watson to a packer at Bradford to be by him packed and forwarded to London for shipment. The packer after packing the goods wrote to L. "I beg to hand you particulars of ten bales, waiting your forwarding instructions." L. replied "Please send the ten bales to the *Gordon Castle* loading in the S. W. India Docks for Shanghai." In reply the packer writes again, "I have forwarded the ten bales per Great Northern for steamer *Gordon Castle*, S. W. I. Dock, carriage paid, £       , at your disposal." The advice note sent by the Great Northern Railway Company to L., after the goods had arrived at their station at Poplar Dock, was to the effect that the goods were held by them as warehousemen at owner's risk ; and that they would be sent to the *Gordon Castle*, S. W. I. Dock ; and they were sent and shipped on board the *Gordon Castle* accordingly, the bills of lading being made out, by L.'s directions to his own order. On L.'s insolvency which ensued while the goods were at sea, Watson had a telegram sent to R. requesting them to deliver the goods to their agents at Shanghai and demanded delivery of the bills of lading from the shipowners who had not yet parted with them. There were questions as to whether and how far the *jus disponendi* had been reserved by Watson ; but the decision of the Court of Appeal was given independently of these questions, on the single ground that the goods on the way to Shanghai were still *in transitu*, the entire journey from the vendor's manufactory by rail and ship to Shanghai having been that contemplated by the agreement between the vendor and purchaser, and the detention in the hands of the packer, the railway journey and detention on the railway premises waiting for shipment being merely stages of that journey. It is to be observed that although L. was asked for forwarding orders, he was not as between himself and Watson free to give any orders except to send the goods on their way to Shanghai according to his agreement. And in this respect the case is quite different from *In re Worsdell, Ex parte Barrow* (p. 355, *supra*).

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It has been decided by the Court of Appeal in *Ex parte Rosevear China Clay Co., In re Cock* (11 Ch. D. 560), that the circumstance of the destination of the goods being named in the contract, or even communicated to the vendor at the time of the contract (it being the common intention that they are to be delivered to an agent *in the capacity of carrier*) is not necessary to the constitution of a *transitus*. In this case the contract was that the vendor should place the goods *on board a ship at Fowey*, and the vendor placed the goods accordingly on board a ship which the purchaser *had chartered for Glasgow*. And although the particular destination was not communicated to the vendor at the time of the contract, the goods when on board were held to be *in transitu*.

Natural end of the *transitus*.

The goods being once in the hands of a forwarding agent for the buyer, and so *in transitu*, I now consider how that state of things comes to an end.

The transit ends by the goods being actually received by the buyer (or his assigns, whether a sub-purchaser or an assignee or trustee in bankruptcy): and this ordinarily happens by their being physically taken possession of by the buyer or his servants: or by their being placed in the custody of a warehouseman duly authorised by the buyer to receive and keep them for him. They are then finally at home to all intents and purposes. For detail on this subject I refer to what has been said about *actual receipt* under the Statute of Frauds (pp. 180—188, *supra*). I here subjoin some observations more particularly relating to stoppage *in transitu*. As I have already observed, I think the same *criteria* would (generally speaking) be held conclusive for both purposes.

Conditions under which *transitus* is ended of goods still in the hands of the forwarding agent.

The goods, under some circumstances are considered as having arrived, although still in the physical custody of the person who originally received them in the character of a forwarding agent. In such a case there must be *first* (unless in the case of a change of destination under the orders of the buyer with the assent of the carrier as after-mentioned) an arrival in fact, so that the goods are physically at the end of their journey; and *secondly*, the concurrence of intention, between the buyer



and the forwarding agent, so that the character of the agency is changed.

As to the arrival in fact:—The *transitus* of goods on board ship is not physically ended by the ship arriving in the port of destination at a spot where it is intended to deliver the cargo *overside* into lighters (*Coventry v. Gladstone*, L. R. 6 Eq. 44); nor even when the goods have been unladen on board a lighter sent by the warehouseman of the buyer to receive them (*Jackson v. Nicholls*, 5 Bing. N. C. 508). Indeed, the lighter-man is only another forwarding agent on the way to the original destination. If however the ship having arrived at the port of destination has got to a *berth* where she is prepared to discharge her cargo, I apprehend that the *transitus* will be at an end so soon as the shipowner (represented by the shipbroker) has been satisfied as to his freight and has given a release of the goods in exchange for the bill of lading. And it is equally at an end when, the ship having so arrived and being ready to deliver, the shipowner wrongfully refused delivery notwithstanding tender of the freight (*Bird v. Brown*, 4 Ex. 788).

As to the change in the character of the agency:—"If," says Mr. Blackburn (p. 248), "the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at an end; but I apprehend that both these intents must concur, and that neither can the carrier of his own will convert himself into a warehouseman, so as to terminate the *transitus*, without the agreeing mind of the buyer, *James v. Griffin* (2 M. & W. 623), nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer. *Jackson v. Nicholls* (5 Bing. N. C. 508)."

The fact that the carrier still holds the goods subject to his lien is not absolutely conclusive against an arrangement having been made that he shall hold the goods in the character of a warehouseman for the buyer (*Allan v. Gripper*, 2 Cr. & J. 8). But the lien continuing, there is a strong presumption against a new arrangement having been made (*Ex parte Cooper, re Maclaren*, 11 Ch. D. 68), and to overcome this pre-

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sumption, evidence would be necessary either of an explicit arrangement between the carrier and the buyer, as in *Foster v. Frampton* (6 B. & C. 107), or of a course of dealing as in *Allen v. Gripper* (*supra cit.*), *Dodson v. Wentworth* (4 M. & Q. 1080); so as to make the carrier's warehouse the buyer's repository for the goods. In *Whitehead v. Anderson* (9 M. & W. 518) it was held not sufficient that the captain told the buyer's assignee that he *would* deliver to him *when he was satisfied* about the freight.

And so where part of a cargo has been delivered, the freight being unpaid upon the rest which still remains subject to the shipowner's lien, the presumption is that the goods so remaining are in the possession of the shipowners as carriers, and the *transitus* is therefore not ended in regard to them (*Ex parte Falk, In re Kiell*, C. A. 14 Ch. D. 446).

End of *transitus*  
anticipated.

The *transitus* is also ended if the buyer or his assignee anticipates the natural termination of the transit by meeting the goods on their way, and taking possession of the goods *with the assent* of the carrier. An act which in itself might be regarded as either an act of ownership over the whole cargo or over only part of it has been held sufficient, where the intention appeared to take possession of the whole (*Jones v. Jones*, 8 M. & W. 431). And if the buyer alters the destination of the goods by a direction to the carrier, to which the carrier assents, that appears sufficient to terminate the *transitus*, just as this was sufficient to constitute actual receipt in *Morton v. Tibbett* (15 Q. B. 428, and see p. 176, *supra*).

What if tortious  
against the  
carrier?

Whether the *transitus* is terminated by the buyer prematurely taking possession against the will of the carrier, and so tortiously against him, has been questioned. Mr. Blackburn, (p. 259), after citing the cases of *Holst v. Pownal* (1 Esp. 242); *Mills v. Ball* (2 B. & P. 457); *Wright v. Lawes* (4 Esp. 82); *Jackson v. Nicholls* (5 Bing. N. C. 508), and *Whitehead v. Anderson* (9 M. & W. 518); sums up the result as follows:—  
“Such being the authorities, it seems pretty clear, that in cases in which there is no actual delivery, if the vendee require that the carrier shall hold the goods as his agent in a new capacity, and he assent, the *transitus* is ended, whether it be before or

ter its natural termination; and if the carrier does not assent, and is under no obligation to assent, that the *transitus* is not ended. But, perhaps, if the position of the carrier is such that it is his duty to obey the command of the vendee, his assent to the duty would be implied by law, and his refusal in fact, would not prevent such an implication. And notwithstanding the expressions of the Exchequer in *Whitehead v. Anderson*, it is submitted that it is doubtful whether when the carrier has a right to refuse to allow the vendee to take even constructive possession, the vendee can improve his position by a tortious taking of actual possession against the will of the carrier. The law in general discountenances violence, and it would seem not consistent with its general policy, to give a man a benefit in consequence of his forcible or fraudulent wrong against a third party. The act of taking away the goods would be a very unequivocal assertion of the vendee's claim to exercise dominion if he had the right to do so, but it is very difficult to see how it could give him such a right, if he had it not already."

Now, as between the consignee and the carrier, the former has, in general, no right to interfere before the natural termination of the voyage or journey. But (as Mr. Blackburn further observes) when the voyage or journey has come to its natural end the case is different. The carrier has no right to insist on keeping the goods as carrier, but merely to retain the possession holding the goods subject to any orders of the vendee not derogatory to his lien. And the decision of *Bird v. Brown*, in 1850, subsequently to the publication of Blackburn's work (4 Ex. 786), is entirely in conformity with this view, it being there decided that, the voyage having come to its natural end, an unequivocal demand of the goods by the assignee in bankruptcy of the vendee, accompanied by a tender of the freight, terminates the *transitus*.

I must here advert to a class of cases where the buyer, being aware of his impending insolvency, rejects the goods on their arrival. This may give rise either to a stoppage *in transitu* or to a state of things having a nearly though not necessarily quite similar effect.

On the arrival of goods in such circumstances the insolvent

End of *transitus*  
postponed by  
act of the buyer.

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Where *insolvent*  
buyer rejects the  
goods with the  
intention of  
offering to  
rescind.

buyer has several courses open to him. 1st. He may accept the goods so that they will become part of his general assets on bankruptcy, leaving the vendor to come in as a creditor on his estate for the price so far as unpaid. 2ndly. He may decline to take possession, so as to prolong the *transitus*, and give the vendor the chance of stopping the goods. Instances of this are *Hutchings v. Nunez* (1 Moo. P. C. N. S. 243); *James v. Griffin* (2 M. & W. 623). Or, 3rdly. He may reject them with the intention of making an offer to rescind the contract, and in such a case the offer is irrevocable so as to be binding on the buyer and on his estate until the vendor has had the opportunity of accepting or declining it. *Atkins v. Barwick* (1 Str. 165); *Salte v. Field* (5 T. R. 211); *Bartram v. Farebrother* (4 Bing. 579). The *rationale* of this is not very clearly expressed in the decisions, but I apprehend it is, that the offer to rescind made under such circumstances implies a promise that the offer shall not be recalled until the vendor has had the opportunity of considering it, and that there is also implied under the circumstances a good consideration for this promise, so as to make it binding and in effect to create a contract giving the vendor the option to rescind. In *Smith v. Field* (5 T. R. 402), it was held that the vendor having attached the goods in the hands of a packer as the property of the vendee had elected *not* to rescind the contract, but the authority of *Atkins v. Barwick* and *Salte v. Field*, which show that the option is reserved to the vendee under such circumstances, is fully recognised.

In *Dixon v. Baldwin*, 5 East, 175, the vendor had resumed possession of the goods on a claim to stop *in transitu*; and the vendee being insolvent, but not having committed any act of bankruptcy, with the sanction of a meeting of his creditors and under legal advice, agreed to give up the goods: and, although the Court held the *transitus* to have been at an end when the act purporting to effect a stoppage took place, it was held that a jury were justified in finding that the goods were given up *bonâ fide* and not from any motive of voluntary and undue preference to the vendor, and the transaction by which the goods were given up to him was accordingly held good.

By what act is

Referring to the order indicated on p. 350, *supra*, I now

consider, *secondly*, what act is necessary to constitute a stoppage.

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stoppage  
effected.

It has been said by Lord Hardwicke, in the case of *Snee v. Prescott* (1743, 1 Atk. 245, 250), one of the early reported cases on the subject of stoppage *in transitu*, that the vendor might get the goods back "by any means, provided he did not steal them." This suggests a kind of physical intervention which is by no means necessary to the act of stoppage. The usual, and a sufficient, mode of stoppage is a simple notice to the carrier stating the vendor's claim and forbidding delivery to the vendee, or requiring that the goods shall be delivered to the vendor or held to his order (Benjamin, 3rd ed. p. 715; *Jackson v. Nicholls*, 5 Bing. N. C. 518; *Bohtlingk v. Inglis*, 3 East, 381, 385, 394; *Mills v. Ball*, 2 B. & P. 457; *The Tigress*, 32 L. J. Adm. 97). The reader will find that in some of the cases there was a formal demand of the goods accompanied by a tender of freight. But this although necessary, as has been seen, to effect the equivalent of *actual delivery* to the consignee so as to end the *transitus*, does not appear *necessary* on the part of the vendor to effect a *stoppage* so as to revest in himself the *possession*.

The notice ought to be given to the person having the immediate custody of the goods. In the case of an ordinary carrier, a notice given to the master whose servants have the immediate custody of the goods, will be good, if in due time to be communicated by him to the servants in actual charge. And so in *Litt v. Cowley* (7 Taunt. 169) a timely notice at the head office (Pickfords') was held good although through a mistake in the office the goods were delivered to the consignee. It has been doubted whether a notice to a shipowner is of any avail, if not actually communicated by him to the master of the vessel, and whether there is any duty on the shipowner to make the communication, which the party interested would quite as easily (by telegraph or otherwise) do himself (*Ex parte Falk*, *In re Kiell*, 14 Ch. D. 446, 450). At all events a notice to the shipowner which could not in time have been communicated by him to the master of the ship, is insufficient (*Whitehead v. Anderson*, 9 M. & W. 518). In the last cited case it is said by Parke, B. (p. 534), "The only duty that can be imposed on the

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absent principal is to use reasonable diligence to prevent the delivery ; and in the present case such diligence was used." But after the remarks in *Ex parte Falk*, it would not be safe to assume that the Court will hold the shipowner to be under any duty at all of this kind.

In the case of goods which have to pass through the custom house, it seems that a claim made to the customs authorities by a vendor distinctly asserting his right, will be sufficient. Such a claim practically interposes an obstacle in the way of any other person getting the goods unless his title is clear, which *ex hypothesi* that of the consignee is not. So where, under the customs laws, wine had been removed for non-payment of duty into the King's cellar there to remain for three months and then to be sold if the duty was not paid ; and the vendor claimed the wine before the expiration of the three months, but that period having expired without the duty being paid, it was sold ; the vendor was held entitled to receive the balance of the proceeds (*Northey v. Field*, 2 Esp. 613). And a mere entry of the goods at the custom house by the consignor's agent has been held good against the consignee's assignee in bankruptcy who took forcible possession of the goods on their being landed (Benj. p. 217 ; Cooke's Bankrupt Laws, p. 402, and *Ex parte Walker and Woodbridge* (1755) there cited). *A fortiori* there is a good stoppage, where the consignor has paid the duties and obtained the goods from the custom house (*Nix v. Olive*, Abbot on Shipping, 439).

The notice to stop may be given by any authorised agent of the vendor and such authority is within the presumed authority of a general mercantile agent. And a notice given by any one affecting to act on behalf of the vendor will be good, if duly sanctioned by the assent of the vendor (evidenced by an overt act such as posting a letter) before the consignee has obtained the goods or duly demanded them at the end of the *transitus* (*Hutchings v. Nunez*, 1 Moo. P. C. N. S. 243). But a notice given by a person who is in the first instance unauthorised, will not become good if the vendor's sanction is only given after the goods come into the actual possession of or are duly demanded at the end of the *transitus* by the consignee or his assignee in bankruptcy (*Bird v. Brown*, 4 Ex. 786).

In *Jenkyns v. Usborne*, 7 M. & G. 678, the plaintiff had sold on credit, the right which he had to a certain quantity, not specifically separated, out of a parcel of goods (beans in bags) which had been shipped under one bill of lading to H. & Co.—H. & Co. having acknowledged such quantity to be the plaintiff's property by a letter enclosing a delivery order for the same addressed to the master of the vessel. The vendee having stopped payment before the arrival of the vessel, the plaintiff gave a notice to the master of the vessel in these terms:—"There is a parcel of beans on board in dispute. Should you receive an order to deliver same from Messrs. H. & Co. by no means do so," and also a notice to H. & Co. as follows:—"The portion of beans which I hold, according to your letter. . . . I beg you will not allow to be taken away by any parties without further instructions from me." In spite of these notices the beans were delivered to the defendant (an assignee by way of pledge of the vendee) upon his presenting the delivery order. It was held that the interest of the plaintiff in the beans was such as to entitle him to the vendor's privilege of stoppage *in transitu*, and this was well effected; so that the interest in the beans had accordingly become revested in the plaintiff in his right as unpaid vendor. There was no assignment of the bill of lading so as to defeat the right of stoppage, and it was held that the vendee having received the delivery order as vendee was not a person "intrusted with" the document within the meaning of the *then* Factors Acts,<sup>1</sup> so that the defendant had no better title than the vendee.

In *Ex parte Watson, In re Love* (5 Ch. D. 35), it happened that when the insolvency took place the bill of lading had never been delivered by the shipowners to the consignee; and a notice to the shipowners not to deliver the document or the goods except to the vendors, which the vendors so far acted on as to enter into an arrangement to sell the goods for the benefit of whoever should be found legally entitled to them, was held good.

I now consider<sup>2</sup> the *effect of stoppage in transitu*.

The act of stoppage, as above explained, at once reverts the

Effect of  
stoppage  
*in transitu*

<sup>1</sup> As to the Factors Act, 1877, see p. 373, *post*.

<sup>2</sup> See p. 350, *supra*.

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possession, and (to the extent necessary to give effect to the right) the property in the vendor; so that by the notice in *Litt v. Cowley* (7 Taunt. 169) given in due time to Pickfords, the possession was held to be at once revested in the vendor to this effect, although through a mistake of Pickfords' servants the goods had been actually delivered to the buyer. Where the vendor demands delivery of the goods from the master of the ship, it has been held by a decision of Dr. Lushington in the Court of Admiralty that the master is entitled and bound to deliver the goods accordingly, on being satisfied that the demand is made by an unpaid vendor, unless he is made aware of a legal defeasance of the vendor's claim (*The Tigris*, 32 L. J. Adm. 97).

Vendor is simply reinstated in his rights as such.

The possession being so revested in the vendor, the legal consequence is simply that the vendor is reinstated in the position of a vendor who has never parted with the possession, and to restore to him accordingly the right in security known as the vendor's right.

Question : Is stoppage in transitu a rescission of the contract.

The question has been mooted whether stoppage in transitu operates as a rescission of the contract, so that the vendor who puts it in force is precluded from having a remedy in damages upon the personal contract besides.

Discussed on authority and on principle.

The affirmative of this proposition is supported by the authority of Professor Bell (Commentaries, Shaw's edition, p. 184); although he allows that the seller who has remained in possession of the goods may take the full benefit of his lien and at the same time claim as a personal creditor on his contract for the balance. He suggests, as a reason for the distinction, that as the right of stoppage in transitu is exercised *after the property has passed*, the extension of the seller's security may have been given by equity originally, on the condition that the seller shall take back the goods as if the contract were *ab initio* recalled. Professor Bell's view appears to be supported by some expressions made use of by Lord Thurlow in a Scotch Appeal (see note p. 135, Shaw's ed.); and it seems not improbable that Lord Abinger, who expressed a similar opinion in *Wentworth v. Outhwaite* (10 M. & W. 436, 449), may have been in turn influenced by the opinion of Professor Bell.



It is certainly difficult to see the force of Professor Bell's argument, and his reason for the distinction would certainly fail to apply to a case governed by English law, since the *property* must have passed before the ordinary right of lien is exercised. The balance of authority is, I think, now very clearly against the view that stoppage *in transitu* operates a rescission. There is the opinion of the majority of the Court of Exchequer, including Baron Parke, against that of Lord Abinger in *Wentworth v. Outhwaite* (10 M. & W. 436). In the same direction is the inclination of opinion expressed, though cautiously, in *Blackburn on Sale* (p. 339); and to the same effect is the more decidedly expressed and well reasoned opinion of Mr. Benjamin (2nd ed. p. 723—725). By the judgment of the Judicial Committee in *Page v. Cowasjee* (L. R. 1 P. C. 127, 145), it is laid down as the result of the authorities that a resale made by the vendor of the chattel remaining in his possession, the purchaser being in default, does not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may still be due; and the judgment goes on to say (p. 146): "If this is the case where the possession of property sold remains with the vendor, *à fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser and resells it." The question in the case here referred to arose out of a resale under the special conditions of the contract, so that the question of stoppage *in transitu* did not directly arise; but the language of the judgment exactly covers the legal relation which exists when stoppage *in transitu* takes place.

The framers of the Indian Contract Act (No. IX. of 1872, secs. 106, 107) have adopted the principle that the contract is not rescinded by stoppage *in transitu*; and this is an indirect expression of an opinion of no inconsiderable weight as to the result of the authorities in English law. (See Cunningham & Shepherd's Indian Contract Law, Introduction, p. lvi. and p. 267.)

I think, therefore, I am justified both on principle and on authority, in rejecting the view that a stoppage *in transitu* has the effect of rescinding the contract, and in stating its legal

Result is to answer the question in the negative.

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Priority of right of stoppage over certain secured creditors of consignee.

effect as I have done in the sentence in italics on p. 366, *supra*.

The vendor's right under a claim of stoppage *in transitu* is preferable to any claim of the carrier to a lien for a general balance or otherwise, except charges proper to the carriage of the particular goods in question (*Oppenheim v. Russell*, 3 B. & P. 42). I have already in another place mentioned the case of *Mercantile Bank v. Gladstone* (L. R. 3 Ex. 233), where a right described as a right of stoppage *in transitu* in respect of goods shipped *freight free* on board consignee's ship, prevailed against a claim of freight by assignees of the consignee. I have shown that this was a case of reservation by the consignor of the *jus disponendi* and not of stoppage *in transitu*. But it is an authority for the proposition that the freight stipulated for at the commencement of the voyage is the limit of the ship-owner's right as against the vendor's right to stop *in transitu*.

Like the ordinary vendor's right, the right of stoppage *in transitu* avails against a sub-purchaser (not being an indorsee for value of the bill of lading); and therefore avails against a creditor attaching the consignee's right in any way so as to obtain merely a constructive possession (*Smith v. Goss*, 1 Camp. 282).

Right of stoppage—how defeated.

It remains to show how the right in security, so capable of being revived by the act of stoppage *in transitu*, is liable to be wholly or partially defeated, although the act of stoppage is done before the end of the *transitus*.

Indorsement for value of bill of lading by consignee defeats the right of stoppage.

*The indorsement and delivery of the bill of lading by the consignee, with the intention of conferring a property (whether generally, or in the nature of a right in security) in the goods, for valuable consideration, to a person bonâ fide receiving the bill of lading with the intention of acquiring the property, transfers the possession and property in the goods so as to defeat, to the extent of the right of property intended to be transferred by the indorsement, the vendor's right of stoppage in transitu* (*Lickbarrow v. Mason, &c.*, 1 Smith's L. Ca. 699, 6th ed.).

And the proposition may be extended so as to protect the right of the holder acquiring title by successive indorsements, or in the course of circulation of a bill of lading blank endorsed

by the consignor or consignee, provided that each indorsement (or handing over as the case may be) of the document has been with the intention of transferring the property, and that the indorsee or holder claiming the right against the consignor has received the bill of lading for value and *bonâ fide* (*Gurney v. Behrend*, 3 E. & B. 622, 637).

It is to be observed that the *bona fides* which is material is that of the indorsee or holder who relies upon the document and not that of the person indorsing or handing it over. And so, where a consignee to whom the bill of lading had been indorsed with the intention of transferring the property, deposited the document with the consignor's agent as a security for the payment of the bills of exchange which the consignee had accepted, and afterwards by a fraud obtained the bill of lading from the agent and indorsed it for value to a third person, it was held that such third person being in *bonâ fide*, had a good title against the consignor attempting to stop *in transitu* (*Pease v. Gloaher*, L. R. 1 P. C. Ap. 219).

If the transaction with the indorsee was merely intended to confer a *right in security*, a stoppage (or "attempted stoppage," which is the same thing) by the vendor is still effectual to attach the property in the hands of the purchaser, subject to the indorsee's right (*In re Westzinthus, &c.*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376; *Berndtson v. Strang*, L. R. 4 Eq. 481). And, conversely, if the general property has passed by a subsale to an indorsee of the bill of lading, subject as between the consignee and the indorsee, to the right of the former as vendor, the original purchaser by stopping *in transitu*, attaches this vendor's right, and so in effect attaches the purchase-money in the hands of the sub-purchaser (*Ex parte Golding, &c.*, *In re Knight*, 13 Ch. D. 628). And on the same principle, where the indorsee (by way of pledge) of the bill of lading sanctions a subsale by the purchaser and gives up the bill of lading under an arrangement that the goods are to be delivered to the sub-purchaser and that he (the pledgee) is to be paid out of the proceeds; a proceeding which would have stopped the goods *in transitu* if they could have been stopped against the sub-purchaser (which they clearly could not, on account of the

Stoppage still valid so far as relates to rights other than those of onerous indorsee.

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interest which the holder of the bill of lading had in carrying out the transaction); this will have the effect of attaching in the hands of the receiver of the purchase-money the equitable right to the balance after satisfying the pledgee (*Ex parte Falk, In re Kiell*, 14 Ch. D. 446).

Criteria of  
*bona fides*  
required in  
indorsee.

The condition that the indorsee shall take the bill of lading *bona fide*, has been otherwise expressed as "*without notice of any circumstance which ought in fairness to have prevented his taking it*" (per Lord Ellenborough in *Cuming v. Brown*, 9 East, 5; *Rodger v. The Comptoir d'Escompte, &c.*, L. R. 2 P. C. 404).

It is no indication of want of *bona fides*, that the indorsee knows that the goods have not been paid for in money. That they should be sold on credit, and that the credit should not expire until after the expiry of the usual period of transit, is only the usual course of mercantile dealing (*Cuming v. Brown*, 9 East, 506).

But if the indorsee knows of the *insolvency* of the consignee, that is said by Lord Ellenborough (*Vertue v. Jewel*, 4 Camp. 38) to be sufficient to prevent his title prevailing over the vendor's right of stoppage.

It has been held that where the indorsee took the bill of lading under an agreement himself to pay for the goods, which he never did, he was not an indorsee *bona fide* and for value, so as to entitle him to prevail (*Salomons v. Nissen*, 2 T. R. 674, 681).

*Rodger v.*  
*Comptoir*  
*d'Escompte, &c.*

The *criteria* were very fully considered by the Judicial Committee of the Privy Council in the case of *Rodger v. Comptoir d'Escompte, &c.* (L. R. 2 P. C. Ap. 393). A firm in a failing condition agreed with their bankers, who were large creditors, in consideration of debts then due and of the release of a claim in respect of certain engagements (which they had failed to meet in a manner open to the suspicion of bearing a criminal aspect), to make over to the bank the whole of the property specified in a schedule, including "all goods and bills of lading or other documents for all goods now on the way, &c." Subsequently, on arrival of the documents, including certain bills of

lading, these were indorsed and handed over in pursuance of the agreement. The goods on arrival were stopped *in transitu* by the vendors. The Judicial Committee (those present being Lord Chelmsford, Sir James W. Colvile and Sir Joseph Napier) decided that the indorsement of the bills of lading did not defeat the right of the vendors. The grounds of the decision were shortly these. 1. The Bank when they entered into the agreement with the consignees knew them to be in an insolvent condition. 2. It was not a transaction in which value was given *on the faith* of the documents, these being not in the possession of the consignee at the time and merely comprised in a general description, and only afterwards handed over under the agreement and without any new consideration.

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Two grounds of decision.

1. Knowledge of the insolvency negatives the *bona fides*.
2. Nothing done *on the faith* of the instrument.

The latter *ratio decidendi* was dissented from in the case of *Leask v. Scott* (2 Q. B. D. 376), by the unanimous judgment of the Court of Appeal consisting of Lord Coleridge, C.J., and Bramwell and Brett, L.JJ., who decided in effect that the *bonâ fide* purchaser for valuable consideration, who at any time before the goods are stopped has the indorsed bill of lading handed to him in accordance with his right under his contract of purchase, is protected, although he has not in the sense of the judgment of the Judicial Committee given value *on the faith* of the document. We have thus two judgments of Courts of co-ordinate jurisdiction in direct conflict on a point of principle; and it becomes the duty of the writer of a text-book to examine the reasons given. In the judgment of the Court of Appeal it is pointed out that the purchaser in such a case claims not by an equitable but by a legal title; and it is argued that there is neither reason nor authority for denying effect to this title because the consideration on which it is acquired is *past* in the sense that the completed title is transferred in pursuance of an already existing obligation to transfer it.

The latter dissented from by C. A. in *Leask v. Scott*.

This reasoning seems forcible and sound, and exactly hits the point in which I venture to say that the judgment of the Judicial Committee is fallacious. They (L. R. 2 P. C. 405) lay down the principle as follows:—"Doubtless, the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has: the exception is

## PART VI.

founded on the negotiable quality of the document. *It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who, by misplaced confidence, has enabled such third person to occasion the loss should sustain it.*"

Now there is an obvious fallacy in this reasoning by mixing up the doctrine relating to negotiable instruments,—which is really analogous to and an extension of the doctrine as to the advantage of the legal title,—with the totally different principle of estoppel or representation. The expression "*on the faith of*" belongs to the latter doctrine, and (except for some expressions of Ashurst, J., who falls into the same confusion of thought in his judgment in *Lickbarrow v. Mason*) is quite unauthorised in relation to the former.

Conclusion not necessary that value should be given *on the faith of* the documents; or that *new* consideration should be given at the time of the transfer.

I venture therefore to affirm, on the authority of the Court of Appeal, and as the better opinion, that to enable the sub-purchaser to make good his title as an indorsee for value, it is not necessary for him to show that value was given *on the faith of* the documents or that a *new* consideration was given *at the time* of indorsement or transfer. The pre-existing obligation is for this purpose a sufficient consideration. The true analogy seems to be that of a negotiable instrument properly so called, such as a bill of exchange; and there seems no question that a pre-existing debt due to the transferee of such a bill entitles him to all the rights of a holder for value (*Currie v. Misa*, L. R. 10 Ex. 153, 165 (*Ex. Ch.*); same case reported as *Misa v. Currie*, H. L. 24 W. 1050).

I observe that notwithstanding the decision of the Court of Appeal in *Leask v. Scott* (which however I do not find quoted in the subsequent cases in the Privy Council), the Judicial Committee in *Henderson v. The Comptoir d'Escompte, &c.* (L. R. 5 P. C. 253, 261) consider that the time when notice is important is *the time of the indorsement of the bill of lading*; and in the case of *Chartered Bank of India v. Henderson*, L. R. 5

P. C. 501, the judgment in *Rodger v. Comptoir d'Escompte, &c.*, including the passage which I have ventured to note as containing the above fallacious reasoning, is quoted at length, and the case in point distinguished on the ground that the bill of lading was handed over specially at the time in consideration of the release, &c.

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The last mentioned case of the *Chartered Bank, &c.* did not indeed involve the question of stoppage *in transitu*, the goods having been *delivered* to the sub-purchaser without having been stopped. Consequently the knowledge by the Bank of the *insolvency* was immaterial, and the question really was whether they had notice of a certain trust or equity arising out of the original contract, which it appeared they had not, even at the time of their title being completed by the possession of the indorsed bills of lading.

This seems the place to consider the effect, more especially in regard to the right of stoppage *in transitu*, and as to the vendor's right generally, of the Factors Acts, and particularly the last of the series, passed on the 10th of August, 1877, and applying to acts done and rights acquired after the passing of that Act.

Factors Acts.

The previous Factors Acts merely affected the right of stoppage *in transitu* in this way, that if the title of the *indorsee* for value was by way of *pledge* from the consignee and the consignee was a factor having no authority to *pledge*, the title which would not have been good at common law, prevailed by reason of the Acts.

It was however under the Acts previous to that of 1877, held that a person interested in goods on his own account, and having and claiming to hold, not as factor or agent, but in his own right and as his title deed in respect of his own interest, "a document of title," was not a person "intrusted with" the document within the meaning of the Factors Acts (*Van Casteel v. Bowker*, 2 Ex. 702: *Jenkyns v. Usborne*, 7 M. & G. 678). So that if a vendor who had reserved the *jus disponendi* by the bill of lading, or who had retained a delivery order of goods in a warehouse, were by means of the document to affect to deal

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Act of 1877.

with the goods so as to defeat the rights of the vendee; or if a vendee to whom a delivery order had been duly indorsed but who has not got the warehouseman to attorn to him, affected by means of the document to deal with the goods so as to defeat the vendor's rights; he would not by means of the Factors Acts give his assignee any better title than he had himself.

The Act of 1877 (40 & 41 Vict. c. 39) alters this, and (by secs. 3 and 4, which will be found amongst the others fully set out at p. 418, *post*) enacts, in effect, that a vendor or vendee being, as such, in possession of a "document of title" shall be able to effect a sale or give a right in security to another just as if he were a person entrusted by the other (vendee or vendor as the case may be) within the meaning of the Acts.

The 5th section of the Act relates particularly to the subject now in hand; and for convenience I shall here set out this section which runs as follows:—"Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom *or by its express terms transferable by delivery, or makes the goods deliverable to the bearer*) to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*."

The result of this is, that the *attornment* of the warehouseman is commonly a matter of less importance than it was formerly; since a purchaser for valuable consideration receiving from the holder of the document (duly indorsed if purporting to pass by indorsement) a delivery order of the goods expressing that the goods are deliverable to assigns by indorsement, (or to bearer as the case may be) will get a title freed from any vendor's rights to which the goods may have been subject in the hands of the holder of the document, as between such holder and his vendor.

The result just mentioned is one affecting the vendor's right (or vendor's *lien* as it is called in the Act) generally; but as



done by reference to the mode of defeasance by common  
a stoppage *in transitu*, it was necessary to adjourn the  
eration of it to this place. It will be observed that the  
of stoppage *in transitu* itself *may* be affected by the  
n, *e.g.* in case of goods warehoused temporarily at a stage  
transit under a delivery order, or if goods should be  
d by land under a document which by its express terms  
s them deliverable to assigns by indorsement or to  
r.

## PART VII.

### ON THE SECONDARY OBLIGATIONS ARISING OUT OF BREACHES OF THE CONTRACT.

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Division of  
subject.

MUCH that might be said in regard to the secondary obligations arising out of breaches of the contract, and the corresponding remedies by action, is necessarily anticipated in the body of the preceding work, in which I have treated of the primary and substantive rights and duties arising from sales. In what follows I shall refer briefly to the various stages at which the contract may be broken by either party, and note any special points to be observed with regard to the corresponding remedy. I shall consider the remedies by action in case of

I. Breaches by  
seller before the  
property has  
passed.

I. Breaches by the seller before the property has passed.

II. Breaches by the seller after the property has passed.

III. Breaches by the buyer before the property has passed.

IV. Breaches by the buyer after the property has passed.

And I shall consider

V. The effect and proper mode of exercise of the buyer's right, where it exists, of rejecting the goods.

I. And *first*, I consider breaches by the vendor, the property not having passed. There being, in such a case, no question of compelling the specific delivery of the chattel, the only remedy is by an action for compensation in damages for breach of the contract.

Measure of  
damages in  
such case.

The important question is, what is the measure of damages in such an action.

Where there is

If there is a market in which goods of the kind can readily

be bought, the damage is measured by the excess (if any) of the market price at which such goods can be bought at the time of the failure to deliver, over the contract price (*Barrow v. Arnaud* (8 Q. B. 604, 609); *Gainsford v. Carroll* (2 B. & C. 624); *Valpy v. Oakley* (16 Q. B. 941). If there is a period named within which the whole delivery is to take place, the time for delivery, in a question regarding failure to deliver, must be taken to be the end of the period named (*Bergheim v. Bluenavon, &c., Co.*, L. R. 10 Q. B. 319).

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a market for the goods.

If the contract is one of the class before referred to (p. 281, *ante*) where there is a stipulation for delivery by successive quantities; the measure of damages is *prima facie* the sum of the differences, taken at the termination of the successive periods stipulated for (*Ex parte Llansamet Co., In re Voss*, 16 Eq. 155; *Brown v. Muller*, L. R. 7 Ex. 319; *Roper v. Johnstone*, L. R. 8 C. P. 167).

Successive deliveries.

In such a case, if the seller gives notice of his repudiation at an early period, the buyer may either insist upon the contract being performed, in which case, according to the judgment of C. J. Cockburn in *Frost v. Knight* (L. R. 7 Ex. p. 112) he keeps the contract alive for the benefit of the seller as well as his own: or he may treat the repudiation as a breach and at once bring his action, and then the damages must be estimated according to the probable amounts of the differences as above stated (*Brown v. Muller*, *Roper v. Johnstone*, *sup. cit.*). It may be that by the time the damages come to be assessed the actual differences are ascertainable, and then the actual differences will be assessed as the measure (*Roper v. Johnstone*, L. R. 8 C. P. 167). According to the judgment as put by some of the judges in this case, the qualification is added, *in the absence of evidence that the buyer could have mitigated his loss by entering into another contract*. But it is difficult to see how any evidence of this kind could be tendered in such a case. If the buyer had entered into the speculation suggested, it must have been either on his own account or on the account of the original seller. If on his own account, *cadit quæstio*. And if on account of the seller, *non constat* that he had any authority from him to enter into the speculation, or to charge the seller with the excess of the new contract price, if it should turn out

When seller repudiates at an early stage.

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Where buyer  
forbears  
delivery at  
seller's request.

that by waiting until the goods were due he could have supplied himself more cheaply.

If the buyer grants forbearance at the request of the seller, and the latter at last declares himself unable or unwilling to fulfil the contract, the seller will be responsible, in case the market has in the meantime risen, for the whole difference ascertained at the end of the period of forbearance (*Ogle v. E. Vane*, L. R. 3 Q. B. 272). If there has been a request by the buyer to the seller not to send more "that month," or "until we write," assented to by the seller, the presumption of intention is, not to annul the contract, and the effect is that the contract subsists so that the seller is to deliver the whole within a reasonable time from the date of the last request to postpone delivery. This is the effect of the decision of the Exchequer Chamber in *Tyers v. Rosedale and Ferryhill Iron Co.* (L. R. 10 Ex. 195), overruling the judgment of the Court of Exchequer, reported 8 Ex. 305, and approving that of Baron Martin who dissented. To a similar effect is the decision, in an action for non-acceptance, in the case of *Hickman v. Haynes* (L. R. 10 C. P. 598).

If no such  
market.

If there is no market in which the goods are readily obtainable; then according to the general rule, the measure of damages, is the amount of loss which might be expected in the ordinary course of things to flow from the non-fulfilment of the contract, and to be the natural consequences of it, assuming the plaintiff to have acted in a reasonable manner (*Cory v. Thames Iron Co.* (L. R. 3 Q. B. 181, 190); *Re Trent and Humber Co.* (L. R. 6 Eq. 396; 4 Ch. Ap. 112, 117); *Dunkirk Hill Colliery Co. v. Lever*, 26 W. R. 841); and this may be measured by the cost to which the plaintiff is put in supplying himself *cy près* in the ordinary course of business. So in *Hinde v. Liddell* (L. R. 10 Q. B. 265), where the contract was for grey shirtings of a description which could not be bought ready-made in the market, and the plaintiff in order to do his best in the ordinary course of business to fulfil his own contracts, was obliged to go into the market and purchase a somewhat dearer and better article, it was held that a jury might fairly take this into account in assessing the damages. Illustrations

of the principle will also be found in *Bridge v. Wain* (1 Stark. 504); *Borries v. Hutchinson* (18 C. B. N. S. 455); *Elbinger Actien-Gesellschaft v. Armstrong* (L. R. 9 Q. B. 473, 476).

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Where the damages sustained and claimed, are by reason of Special damage. circumstances, more than would be the natural consequences, under ordinary circumstances, of the breach of contract; the claim is said to be for special damage. The conditions under which such a claim can be admitted require careful consideration.

The rule may, I think, be stated as follows:—

Where the contract is made under such circumstances that particular consequences are, at the time of making it, in the contemplation of both parties as the necessary or probable result of a failure to deliver the goods, then if such failure occurs, and these consequences ensue, the buyer may recover the loss thereby sustained as damages for the breach.

The circumstances are very similar to those in cases of implied warranty, where the goods are sold for a certain purpose, as in *Bigge v. Parkinson*, and *Jones v. Bright*, referred to, pp. 325, 326, *ante*. There is, however, this difference; that it is not necessary to show that the seller's obligation for the special damages was intended to be made part of the contract.

The circumstances which give rise to a claim for special damage are well illustrated by the case of *Hydraulic Engineering Co. v. McHaffie*, in the Court of Appeal from the Queen's Bench Division, reported 4 Q. B. D. 670.

*Hydraulic &c.  
Co. v. McHaffie.*

The action was by the buyers, as plaintiffs, against the defendants, sellers and manufacturers, for breach of contract to make a certain essential part of a pile-driving machine called a "gun." Pending negotiations between the plaintiffs and a third person (J.) for supplying J. with a pile-driving machine, the defendants had been called in, and informed that the machine was wanted by J. at the end of August; and subsequently, by correspondence and verbal communications, it was agreed that the defendants should furnish the plaintiffs with the "gun" to be made, according to the plaintiffs' evidence "within four weeks from the delivery of the final order to proceed,"—according to the defendants' evidence, "as soon as possible." The final order to proceed was received by de-

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defendants from plaintiffs on the 26th of July. The defendants were not ready to deliver the gun until the latter part of September; and consequently the plaintiffs were unable to supply the machine to J. according to their contract, and lost their expenditure on the machine as well as their expected profits. The cause of delay was that the defendants had not at the time of making their contract, a foreman competent to prepare the patterns for making the gun. It was held that they were responsible for the loss sustained by the plaintiff as above-mentioned as special damages.

The principle on which this decision is based will appear from the following extracts:—

Lord Justice Bramwell says, p. 675 of the Report,—“The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it: The wrongdoer is *prima facie* only liable for the natural and ordinary consequences of the breach—but where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury; and where the contractee states that he wants the article agreed to be made in order to help him to carry out another contract, the contractor if he commits a breach in the delivery of the article is liable for the loss sustained by the contractee if he becomes unable to carry out that other contract.”

Lord Justice Brett, p. 675, says:—“I do not think it necessary to say that the defendants have expressly contracted to pay the damages caused to the plaintiff by the loss of their contract with J.; an agreement to pay damages does not form part of the contract; but it was fully implied that the plaintiff would hold the defendants responsible for any loss which they might sustain if by the defendants’ default the plaintiff became unable to carry out their contract with J.”

Lord Justice Cotton, p. 677, says:—“This is a case of contract entered into with special circumstances, and the defendants are liable for all the consequences of its breach. It cannot be said that damages are granted because it is part

the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid. We must follow out the rule that the plaintiffs are only to have the damages, which are the ordinary and natural consequences of the breach; but this rule is subject to the limitation that where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account."

The result of these judgments is to modify and better express the rule as stated in the previous cases and in text books (see *Hadley v. Baxendale*, 9 Ex. 341; *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, 478; see also Mayne on Damages, 2nd ed., p. 10; *Sawdon v. Andrew*, 30 L. T. 33).

So that, on the one hand, the mere notice given by the one party of the probable consequences to him, is not necessarily sufficient to throw on the other the burden of the special damage; nor, on the other hand, is it necessary that there should be implied, as a term of the contract, an undertaking by the latter party to be answerable for the special damage. It is enough that under the circumstances, and from the common point of view of the parties, at the time of entering into the contract, a loss, which under ordinary circumstances would not ensue, becomes the natural or necessary result of a breach of the contract.

The cases above referred to of *Hadley v. Baxendale* and *Horne v. Midland Ry. Co.*, are cases of carriers: and having referred to these I shall refer to two more recent cases arising out of a carrier's contract: viz., *British Columbia Saw Mill Co. v. Nettleship* (L. R. 3 C. P. 499); and *Simpson v. L. & N.-W. Ry. Co.* (1 Q. B. D. 274). In the former, a claim for special damage by the non-arrival of a package containing an essential part of the saw-mill, was not given effect to. In the latter, goods were delivered, on the ground of a cattle-show at Bedford, to an agent of a carrying railway company there, to be taken to the show-ground of another cattle-show, at Newcastle: and the plaintiff claimed and recovered against the railway company special damage for loss of profits in consequence of

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the goods arriving too late to be exhibited at the show. Cases, however, of this kind, although eliciting valuable judgments on the principles relating to special damage, must not be too much relied on as guides to judge of the effect of the surrounding circumstances in the case of a sale.

As instances of special damage in the case of an executory contract of sale, I further refer to the two following cases:—*Fletcher v. Tyuleur* (17 C. B. 21); where there was a contract to deliver a ship intended to be used as a passenger ship to Australia; and the plaintiffs recovered as damages the whole loss incurred through a fall in freights for that particular voyage:—and *Smeed v. Foord* (1 E. & E. 602), where the defendant had agreed to deliver to the plaintiff a threshing machine, within three weeks, being about the time when wheat was expected to be ripe. The defendant knew that the plaintiff was a large farmer and required the machine for the purpose of threshing wheat in the field. In consequence of non-delivery of the machine, the plaintiff incurred expense in carrying home the wheat, and loss by its deterioration; and the defendant was held responsible for this expense and loss as special damage.

II. Breaches by seller, after property passed.

II. *Secondly*, I consider breaches by the seller, after the property has passed.

Formerly the remedy in the power of an owner not in possession was confined,—except in certain cases where a Court of Equity intervened to give effect to the right of property in a thing of unique or peculiar intrinsic value (see V.-C. Kindersley's judgment in *Fulke v. Gray*, 4 Drew. 658), to the recovery of a money compensation.

Specific delivery may now be ordered.

But by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 2), a power is given to the Court, in an action for breach of contract to deliver specific goods for a price in money, in their discretion to order specific delivery of the goods to the plaintiff on payment by him of the sum (if any) payable for the delivery, without giving the defendant the option of retaining them upon paying the assessed damages.

Damages in

*Formerly* the buyer, not being in default, might as an alter-



native to an action on the contract, have brought an action for conversion of the goods. The damages however would only have been the difference between the contract price and the market value (*Chinery v. Viall*, 5 H. & N. 288).

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action for  
conversion.

Now, the pleader is not concerned with the technicalities of the forms of action, and it only remains to be considered whether there is any substantial difference between the wrong arising from breach of the contract and the wrongful conversion of the goods. I doubt whether there is any difference in substance. There is, it is true, in the case of *France v. Gaudet* (L. R. 6 Q. B. 199), a suggestion of some special considerations affecting the measure of damages in an action for conversion of the goods. The question arose out of a sale of certain champagne, lying at defendant's wharf, which the plaintiff had purchased from the defendant at 14s. per dozen and immediately sold to the captain of a ship about to sail away, for 24s. This was an exceptionally good bargain, and the plaintiff lost the benefit of it by the defendant's wrongful refusal to deliver, there being no market by which the plaintiff could supply a substituted article in time. The Court held the true rule was to ascertain the "actual value" of the goods at the time of the conversion and that a *bond fide* sale having been made to a solvent customer at 24s. per dozen the champagne had, owing to these circumstances, acquired an actual value of 24s. The judgment goes on to describe this as "a special value attached by special circumstances to the article converted;" but it may be questioned whether this is anything more than an assertion of the commonplace, that the best test of value of an article for which there is only a limited market, is the price in an actual contract of sale. Where the person guilty of the conversion was a sub-contractor, a mere stranger to the plaintiff, the measure of damages has been held to be the full value at the time of the conversion without deduction of price, notwithstanding there had been an arrangement for direct payment (*Johnson v. Lancashire & Yorkshire Ry. Co., &c.*, 3 C. P. D. 499). There would now be a counter-claim in such a case.

If not only the property has passed, but the vendor has performed his part of the contract by the delivery of the goods so that nothing remains but a debt of the buyer for goods sold

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and delivered; and if the vendor has *then* wrongfully retaken the goods into his possession, and an action is brought for the conversion of the goods, the price cannot be set off; because, as it has been said, it would be allowing a debt to be set off against damages for a trespass (*Gillard v. Brittan*, 8 M. & W. 575). Under the modern procedure, however, in such a case, the debt for the goods sold and delivered may be properly the subject of a counter-claim.

Action for  
breach of  
warranty.

Again, supposing goods in which the property has passed to have been delivered, or goods tendered under an executory contract to have been accepted; but the quality of the goods is inferior to that stipulated for. There is then on the part of the vendor a breach of warranty—*i.e.*, either of warranty properly so called, or of a condition which the buyer has elected to treat as a warranty. The remedy of the buyer, so far as relates to the difference of value between the thing supplied and that contracted for is, in the option of the buyer, either by an action against the seller for damages, or by a deduction in the way of set-off from the price. But, according to the rule before the Judicature Acts, the claim, so far as relates to any special damage, could only be made good by action (*Mondel v. Steel*, 8 M. & W. 858; *Davis v. Hedges*, L. R. 6 Q. B. 687). Now, the claim for special damage would be either by action, or, where an action has been brought for the price, by counter-claim.

Measure of  
damages for  
such breach.

The principles in relation to the assessment of damages for breach of warranty, and the circumstances under which special damage may be recovered, are exactly the same as in regard to the essential matter of the contract. The criterion is, generally speaking, the difference in value at the time of the delivery between the goods sent, and goods of the warranted quality (*Jones v. Just*, L. R. 3 Q. B. 197).

I here note a class of cases in which, without proving any special circumstances, an amount of damage large in proportion to the price, has been held recoverable. This is the case in a sale of seed, either by description, or with a warranty, the seed delivered having turned out bad. Instances are *Poulton v. Lattimore* (9 B. & C. 259), where the buyer succeeded in his

defence to the extent of the whole price; and *Randall v. Raper* (E. B. & E. 84), where he recovered a much larger amount as compensation for the loss, which was held to be the natural and necessary consequence of the breach. On a similar principle, it has been held that on the sale of a cow to a person whom the vendor knew to be a farmer, with a warranty that the cow was free from foot and mouth disease, the entire loss arising from the cow being placed with other cows which became infected was the natural consequence of a breach of the warranty (*Smith v. Green*, 1 C. P. D. 92).

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Where goods sold under a warranty are resold under a similar warranty; the liability under the latter warranty may be estimated and the amount adopted as the measure of damages incurred by breach of the former warranty (*Randall v. Raper*, *supra*; *Lewis v. Peake*, 7 Taunt. 153). And if the first seller has been offered the option of defending the action in regard to the latter warranty the costs may be recovered as special damage (*Lewis v. Peake*, *supra*).

If the defect which is charged as a breach of warranty was patent at the time of delivery, and the buyer has then accepted the goods without giving the vendor any notice of the defect, there would be strong ground for the presumption that a subsequent complaint is not well founded (*Fisher v. Samuda*, 1 Camp. 190; *Prosser v. Hooper*, 1 Moo. 106). But this presumption may be rebutted by circumstances explaining the want of notice, particularly where the existence of the defect, though suspected at the time of the delivery, could not then have been conclusively proved (*Poulton v. Lattimore*, 9 B. & C. 259, 265; *Fielder v. Starkin*, 1 H. Bl. 17, 19).

III. *Thirdly*, I consider breaches by the buyer, before the property has passed.

III. Breaches by buyer before property has passed.

Such breaches in regard to the essentials of the contract must consist of non-acceptance of the goods and non-payment of the price.

The property being still in the vendor, there is no question as to his power to resell or otherwise deal with the goods, and this is taken into consideration in assessing the damages which he can claim in an action for the breach: and the measure of

Measure of damages.

## PART VII.

damages when there is a market for the goods, is the difference between the contract price and the price at which the goods can be sold in the market at the time of breach. For just as in the case of breach by the vendor the buyer, having the money, can go into the market and buy (*Barrow v. Arnaud*, 8 Q. B. 604, 609), so in the case of breach by the buyer, the vendor, having the goods, can go into the market and sell (*Benj.* 2nd ed. p. 618; *Philpotts v. Evans*, 5 M. & W. 475; *Boorman v. Nash*, 9 B. & C. 845; *Boswell v. Kilborn*, 15 Mo. P. C. 309).

If before the time for delivery the buyer gives notice that he will not accept, the seller has, just as in the converse case mentioned (p. 377, *ante*), the option of on the one hand treating the notice as a breach and bringing his action accordingly: or, on the other hand, of waiting until delivery is due and claiming damages at that date; and it appears that in the latter case he need not go through the formality of tendering the goods, as the buyer's notice, unless withdrawn, will be treated as a continuing refusal to receive them (*Philpotts v. Evans*, 5 M. & W. 475; *Boorman v. Nash*, 9 B. & C. 845; *Ripley v. McClure*, 4 Ex. 345; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127).

In the case of an executory contract to manufacture and supply goods for which there is not a ready-made market, the only rule as to the measure of damages for breach by non-acceptance is that the sellers are entitled to be put in the same position as if they had performed their contract (*Cort v. Ambergate Ry. Co.*, 17 Q. B. 127).

There cannot in the case of breach by the buyer, be any question of special damage, the price with interest being in all cases the outside measure of the damage, and the only question being how much is to be set off by reason of the virtual release of the seller from further performance on his part.

Although as a general rule, the measure of damages is the difference of market price as above mentioned, it is possible for persons so to contract that in case of non-payment of the price by a certain day whether the buyer is ready to accept the goods or not, the price may become a debt for which the vendor may have an action and recover the entire amount without setting off the value (*Dunlop v. Grote*, 2 Car. & K. 153).

IV. In regard to breaches by the buyer after the general property has passed, little remains to be said. The vendor's rights remaining *in* the goods have been fully discussed. The contract having been executed on the part of the vendor he is entitled in an action to judgment for the whole price as a debt. But he cannot of course by using both remedies take more than his debt.

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IV. Breaches by  
buyer after  
property has  
passed.

If the buyer has given a bill in payment, the seller must account for the bill if dishonoured, and cannot recover the price, if the bill is outstanding (Benjamin, 2nd ed. pp. 600, 624 ; *Price v. Price*, 16 M. & W., 232).

V. I now consider, *fifthly*, the effect and proper mode of exercise of the buyer's right of rejection of goods.

V. Buyer's right  
of rejection.

It has been already shown (p. 300, *ante*) that where goods are sold by description—including the case of a sale by sample—and the vendor affects to perform the contract by tendering goods not according to the description, the buyer has the option of on the one hand rejecting the goods tendered; or on the other hand of accepting the tender as a substantial performance of the contract, and treating the defect in quality as a collateral matter, and as a ground of action, in the nature of an action for compensation or damages for breach of warranty.

If the goods tendered are rejected, and properly rejected by the buyer, I apprehend there can be no doubt that the position remains the same as if the vendor had done nothing under the contract. There is no specific appropriation and no transfer of property, and the vendor, if delivery under the contract is due, is liable to an action for non-delivery.

Effect of its  
exercise.

It is not necessary that the buyer rejecting the goods should send them back bodily to the seller: it is sufficient that he unequivocally notifies to the seller that he does not accept the goods, and that they are at the seller's disposal and at his risk (*Grimoldby v. Wells*, L. R. 10 C. P. 391 : *Couston v. Chapman*, L. R. 2 Sc. Ap. 250, 256 : *Okell v. Smith*, 1 Stark. 107). In the meantime and until the vendor gives directions as to their disposal, I apprehend the buyer would be merely responsible for them as an involuntary bailee, and as such bound merely

Mode of exercise.

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to act with regard to the goods in a reasonable manner (*Haugh v. L. & N.-W. Ry. Co.*, L. R. 5 Ex. 51).

Non-acceptance.  
Distinction.

The principles above mentioned apply to the right of rejection generally. I now distinguish two classes of cases: (a) When the buyer does not in any manner accept the goods tendered; (b) Where he accepts them conditionally or provisionally; that is to say subject to the condition that his acceptance may in certain circumstances be recalled.

(a) Where no  
acceptance  
at all.

(a) Where the buyer does not in any manner accept the goods.

This class of cases requires no further comment. What is and what is not acceptance has been considered at length in treating of the Statute of Frauds, and in thus treating the subject I have repudiated the notion of any ambiguity in the word itself. It has been pointed out that receiving or taking delivery is not necessarily acceptance, and that this depends on the intention, namely whether the buyer receives the goods with the intention to appropriate them, or with some other intention, as for the purpose of conveniently inspecting them.

(b) Where there  
is a conditional  
acceptance.

(b) Where he accepts the goods conditionally.

It has been already observed (p. 178, *ante*) that the purchaser may in certain circumstances accept or take delivery of the goods conditionally (*Couston v. Chapman*, L. R. 2 H. L. Sc. 250, *per* Lord Chelmsford, p. 254; *Heilbutt v. Hickson*, L. R. 7 C. P. 438, judgment of *Brett*, p. 456). The *rationale* of the matter may be put thus:—In regard to faults which are latent at the time of delivery, or where there is under the circumstances no opportunity of inspection at or previously to delivery; the purchaser may take delivery relying upon the tender as a representation by the seller that the goods are according to the description; and in that case his acceptance is not necessarily final, but may be recalled upon discovering the defect, provided he has made examination as soon as is reasonably practicable, and that he notifies his rejection immediately on making the discovery. In this case, according to the judgment of Lord Justice Brett in *Heilbutt v. Hickson* above referred to, the buyer may throw the goods on the hands of the vendor at the place where the examination is duly made and

the defect discovered. That the goods may be so thrown on the hands of the seller without any *onus* on the buyer to send them back seems a mere corollary from the option of rejection, it being impossible to assign any reason for throwing on the buyer the burden of a situation which has arisen without any fault of his.

In the case of *Mody v. Gregson*, L. R. 4 Ex. 49, (referred to p. 304, *ante*), the action was upon an implied warranty; but the case illustrates the consequences of a latent defect which in this case was the admixture by the sellers, themselves the manufacturers, in the goods (grey shirtings), of 15 per cent. of china clay which rendered the goods unmerchantable. The defect probably existed in the sample itself, and was such as could not be discovered on the inspection made when the goods were accepted as according to sample. The buyer was held entitled to recover upon an implied warranty of merchantable quality in the goods supplied. The Scotch case of *Macfarlane v. Taylor*, the case of coloured whiskey for the African trade (L. R. 1 Sc. Ap. 245), was to a similar effect.

The meaning and effect of rejection, where it has taken place subsequently to the conditional acceptance, is to defeat any effect which such acceptance would otherwise have had and to make void any transfer of property which that acceptance would have imported. I apprehend, however, that until rejection, the property must be considered as having vested in the buyer, so that any dealing by him with the property would be effectual. And in case he has indefeasibly transferred the property to a third party his acceptance must be treated as final; and if a latent defect is subsequently disclosed, he could only treat it as matter of warranty.

Meaning and effect of rejection in latter case.





ON COMMERCIAL AGENCY, &c.



## PART VIII.

### AGENCY.

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AGENCY is a relation between two persons such that the act of the former, called the agent, is by law imputed as the act of the latter, who is called the *principal*.

Agency is grounded on the concurrent intention (actual or presumed) between the two persons that the one shall do the act and the other have the benefit and be held responsible : for to this intention the law gives effect.

This intention may be expressed (speaking generally) *in any way* ; or it may be implied or presumed from a course of dealing or conduct ; the doctrine of estoppel or *holding out* (see p. 33 *et seq. supra*) being very liberally applied in regard to agency. As an instance of the doctrine of holding out so applied I may mention the case of *Chapleo v. Brunswick Benefit Building Society* (5 C. P. D. 331). The building society in question was authorised by their rules, made pursuant to the Building Societies Acts, to borrow money. According to the mode of conducting business described in the evidence, they allowed their secretary to act as their "factotum." It was on this evidence held by Lord Coleridge, C.J., that the society and the directors were bound by the receipt and undertaking of their secretary in respect of money paid to him as borrowed in the name of the society, and which he appropriated to his own use. This decision (after the refusal of Lindley, J., to grant a rule for a new trial) was reversed by the Court of Appeal (Bramwell, Baggallay, and Brett, L.JJ., 7 Mar. 1881, 50 L. J. Q. B. D. 372) so far as relates to the *society*, on the ground that at the time of making the loan in question, the borrowing powers under the statutory rules, under which alone the society had power to borrow, had been exceeded ; and the loan was therefore altogether *ultra*

#### PART VIII.

Definition of agency.

Act of A. imputed to B. Grounded on concurrent intention.

Expressed in any way. Or presumed.

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*vires* of the society. But as regards the directors the decision was (by a majority, Baggallay and Brett, L.JJ., against the opinion of L.J. Bramwell) affirmed and the directors held personally liable, on the ground that they had held out the secretary as having authority to accept the loan, in that they had, after they knew that the borrowing powers were exhausted, authorised him to go on receiving money on loan.

Agency extended  
to omissions.  
Examples.

In an extended sense the subject of agency embraces relations arising out of *omissions* as well as *acts*. So that if I am under a duty which I delegate to another who altogether neglects it, his omission is imputed to me. And if I leave a person in charge of my house or place of business, and an important communication affecting me as owner of the house, or proprietor in the business is made to such person, and he fails to inform me of it, the knowledge so communicated is imputed to me so that I am in effect charged with the consequences of the omission.

Order of subject.

I propose to treat the subject of agency with reference, chiefly, to the questions which arise between the principal or agent on the one hand and persons dealing with the agent on the other. In so treating the subject I shall first state some principles relating to agency generally; and I shall then consider in some detail the functions of certain large and important classes of commercial agents. Lastly, I shall in a separate and final part of this work discuss the subject of fraud and breaches of confidential duty; having regard especially to the relation of agency, but also supplementing what is already set forth as to contracts generally and particularly contracts of sale.

#### SECTION I.—GENERAL PRINCIPLES OF AGENCY.

General  
principles.  
Personal  
capacity.

In stating the general principles, I first advert to the capacity of persons to enter into the relation of agency.

It is here necessary to distinguish.

Capacity of  
principal same  
as in other  
contracts.

To enter into the relation *as principal*, the same conditions are necessary as to enter into a contract of sale or any other consensual contract. These I have already described, pp. 23–29, *ante*; and I shall in a subsequent place add some detail in regard to corporations acting through their officers and agents.

So of agents to  
incur liability.

In regard to the *agent*, so far as relates to any obligation attaching to him, the same conditions apply.

But in order that the legal relation may attach as between the principal and third parties, it is only necessary that the *agent* is an intelligent and rational being capable of acting in fact. So I may authorise a boy to collect money and give receipts; and his receipt given on payment would undoubtedly be binding on me although I never got the money.<sup>1</sup> So a wife may bind her husband within the scope of her authority, though she could not bind herself.

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But not in order  
to render  
principal liable.

If I commit the doing of something to A. as my agent, I do not, as a general rule, authorise him to commit it to B., nor consent that I shall be responsible for B.'s acts. In other words, the mere fact of a thing being committed to A. as agent for another, does not raise a presumption that A. is empowered to sub-commit the doing of it, so as to raise any privity between his principal and the sub-agent, or to render the principal responsible for the act of the sub-agent. The general rule to this effect is laid down by all writers on the law of agency, and decisions illustrating the rule are *Solly v. Rathbone* (2 M. & S. 298), and *Catlin v. Bell* (4 Camp. 188), as to factors; *Cockrane v. Irlam* (2 M. & S. 301) and *Henderson v. Barnwell* (1 Y. & Jer. 387), as to brokers; *Doe v. Robinson* (3 Bing. N. C. 677), as to an agent to give notice to quit; *Coles v. Trecothick* (9 Ves. 250), as to an auctioneer; *Howard's case* (L. R. 1 Ch. 561), as to the board of directors of a company exercising the power given them by the deed of settlement, of allotting shares; *Cartmell's case* (L. R. 9 Ch. 691), as to the power given by the articles of association of a company to the directors to buy shares.

*Delegatus  
delegare, &c.*

But there is no reason why I should not by an express mandate to A., commit to him a business with power to employ agents under him, and if I do so, the agent so employed will be (so far as relates to third parties) my agents. And if from the nature of the business committed to A. or from the usual

<sup>1</sup> Upon the cognate subject of the capacity of an infant to exercise a power, see *In re D'Angibau, Andrews v. Andrews*, 15 Ch. D. 228, and the judgments of Lords

Justices Brett and James, which are based on the general principle that an infant may validly execute a mandate.

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practice in the like cases it may be fairly inferred that the power to commit to sub-agents was intended, the result will be the same as if express authority to this effect had been given (see *De Bussche v. Alt*, 8 Ch. D. 286, 310).

The principle which forbids delegation of a delegated authority is not confined to cases of agency properly so called, but extends to powers created by settlements of property, such as a power of sale in a person not having the legal fee, and powers conferred upon corporations by the Supreme Legislature, which cannot be delegated to another corporation without express legislative authority. The whole doctrine depends on the intention, express or presumed, of the original mandate.

Ratification.

*Ratification* takes place where the intention of the principal to be responsible, concurs after the act, with the intention of the agent.

An act to be capable of ratification must be one which is not void as a criminal act, or in itself incapable, on any ground, of having legal effect.

If A. sign B.'s name to a document professing, under a mistaken belief, that he has B.'s authority for doing so, B. may ratify the act so that B. will be bound by the signature. But if B.'s signature to the document is *forged*, the act being void is incapable of ratification; and moreover if A.'s intention in professing to ratify the act, was to screen the criminal, the ratification would be void for the further reason that it would be against public policy (*Brook v. Hook*, L. R. 6 Ex. 89).

Whether an unauthorised act done by officers or servants of an incorporate company may be ratified by the assent of the general body of shareholders expressed by resolutions of general meetings or otherwise, depends on whether the act is within the scope of the objects of the company as expressed in the memorandum of association (or in the incorporating Acts, as the case may be). If it is within such scope then it may be ratified; if not, not. This was expressly decided in regard to a company incorporated by special Act in *East Anglian Ry. Co.*, 11 C. B. 775. And the question was fully discussed and decided, in the case of a company incorporated under the Act of 1862, in

*Asbury Railway Carriage, &c., Co. (Limited) v. Riche* (L. R. 7 H. L. 653). In such a case the memorandum of association is the charter of the existence and powers of the company, and any act beyond the scope of the memorandum is incapable of being ratified or in any way made good.

The act to be ratified must be done professedly on behalf of the person who subsequently ratifies it (*Watson v. Swann*, 11 C. B. N. S. 756).

From the last proposition may be deduced another, for which there is, independently, abundance of authority; namely, that promoters of a company not yet formed cannot contract on behalf of the intended company, so that there can be any effectual ratification of the contract by the company when formed (*In re Empress Engineering Co.*, 16 Ch. D. 125, 128; *Melhado v. Porto Allegre, &c. Ry. Co.*, L. R. 9 C. P. 503; *Hereford & S.-W. Waggon, &c. Co.*, 2 Ch. D. 621; *Kelner v. Baxter*, L. R. 2 C. P. 174). This is quite consistent with the cases which show that the company when formed, taking the benefit of work done may be liable to pay for it. But this must be on some ground on which a privity is established between the company when formed and the person claiming the remuneration; and this must be either through a trust constituted by the articles of association; or by some act of the company from which a new contract can be implied adopting the contract of the promoters, and for which the benefit received by the company would be a good consideration (*Touche v. Metr. Ry. &c. Co.*, L. R. 6 Ch. 671; *Empress, &c. Co.*, and *Hereford, &c. Co.*, *supra*).

The ratification cannot alter any right acquired in the meantime by a third party by reason of the omission to give the authority to the original act. This is exemplified by the case of *Bird v. Brown* (p. 361, *ante*), showing that a ratification of the agent's act stopping *in transitu* comes too late if given after the arrival of the goods. There is an exception to this based on mercantile convenience, and on long established authority, in the case of contracts for marine insurance which may be ratified by the assured after a loss has occurred and become known (*Williams v. North China Insurance Co.*, 2 C. P. Div. 757, 764, 766, 770).

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*Fowler v.  
Hollins.*

*Hollins v.  
Fowler.*

I may here mention the case of *Fowler v. Hollins*, which underwent an elaborate discussion before the Exchequer Chamber on a case stated on appeal from the Queen's Bench, and in which the decision of the Exchequer Chamber (L. R. 7 Q. B. 616) was affirmed on ultimate appeal to the House of Lords (*sub nom. Hollins v. Fowler*, L. R. 7 H. L. 757). H., a person whose ordinary business was that of a broker, purchased cotton from B. in the belief and expectation that a certain client (M.) would (as he afterwards did) accept it. H. transferred the cotton to M., charging him the price according to the bargain with B. It turned out that B. had obtained the cotton by a fraud, and the owner afterwards demanded the cotton from H. and sued him for *conversion*. The question whether H. was liable turned upon whether he acted simply as an agent in his character of broker or not; and it was ultimately decided that, as he had admittedly no principal at the time of his purchase from B., he must be taken to have acted as principal, and therefore to be liable to the owner for having disposed of the goods.

General and  
special agents.

Distinction  
correctly appre-  
ciated by Lord  
Ellenborough in  
*Whitehead v.  
Tuckett*.

The meaning of  
the distinction  
analysed.

In mercantile agencies, there is an important distinction, which has been marked by the terms *general agent*, and *special agent*. These terms have been used with various shades of meaning; but the really significant distinction is that noted by Lord Ellenborough (*Whitehead v. Tuckett*, 15 East, 400, 408) between a particular and a general authority, "the latter of which (he says) does not import an unqualified authority, but *that which is derived from a multitude of instances*; whereas the former is confined to an individual instance." This is pregnant language, truly indicating a distinction which I here proceed to analyse.

*From the point of view of the person who deals with one assuming to act as agent for a principal*, there are two well marked modes in which the authority may be known. One mode is to look at the proposed dealing in connexion with other instances,—whether in a course of dealing between the same parties or in the usual course of dealing by merchants in the like circumstances,—and to infer from all the instances the nature and extent (or the scope) of the authority. The other



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mode is to enquire, without reference to instances, what is the actual authority conferred. The circumstances which make one or the other of these modes reasonable and proper, are not easy to describe by comprehensive language; but are not difficult to recognise by the light of common sense and experience of business. The judgment of experience and common sense on the matter is for practical purposes the ultimate fact. If the circumstances are such that it is reasonable to adopt the former mode of ascertaining the authority, then the agent is said to be a *general agent*: if not he is said to be a *special agent*.

Looking from the same point of view, the authority of a general agent is well said to be *derived*, as it is in fact *inferred*, from a *multitude of instances*; and by reasonable consequence, the principal is bound by the acts of the agent *within the scope of the authority which may fairly be inferred from the instances*. In the case of a *special agent*, the authority is truly said to be confined to an individual instance; being *ex hypothesi*, ascertainable only from information as to the actual fact in that instance: and in this case the principal is only bound by the act of the agent *within the terms of the actual authority*, unless he has *represented* the authority to be in fact more extensive.

Its practical application.

This rationale of the distinction between a general and a special agent is quite consistent with all the English cases in which I find importance attached to it (see in particular *East India Co. v. Hensley*, 1 Esp. 112; *Smith v. McGuire*, 3 H. & N. 554; *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248; *Fenn v. Harrison*, 3 T. R. 757, 762, referred to in *Whitehead v. Tuckett*, above mentioned; *Todd v. Robinson*, Ry. & Moo. 217; *Gilmour v. Robinson*, *ib.* p. 226): and it is also consistent with the use which I find made of the terms by Mr. Justice Lindley in his book on Partnership (3rd ed. p. 262, cf. p. 266). Certainly in none of the cases is any attempt made to furnish any more intelligible description of the marks by which these two classes of agents may be recognised.

English cases furnish no simple criterion.

In the above-mentioned case of *Smith v. McGuire*, the term "general agent" in Baron Martin's direction to the jury, which was adopted by the Court as right, is employed to convey the

"General agent" sometimes loosely employed as

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meaning a  
person with a  
large general  
authority.

*Smith v.*  
*McGuire*, 3  
H. & N. 554.

meaning above assigned to the term, with a shade of difference; namely that not only was a person dealing with the agent entitled to infer the scope of his employment from a course of dealing; but further that the scope of the employment was of considerable latitude.

The question in *Smith v. McGuire* was as to the authority to enter into a charter-party, the instructions having been in fact exceeded. There was evidence of a course of dealing amounting to a delegation of the entire management of the Irish branch of a merchant's business. At the trial, Martin, B., asked the jury whether the agent in question was permitted and allowed by the defendant to act as his "general agent" at Limerick, and directed them that, if he was, it was not material what the private arrangement between them was. A verdict for the plaintiff under this direction was sustained. Two questions were really involved in this decision namely, 1st, whether the course of dealing held out an authority; and 2ndly, whether the scope of that authority was wide enough to include the charter-party. In effect the jury answered both these questions in the affirmative, and the Court confirmed this finding as justified by the evidence.

General and  
special agent  
according to  
Ross' edition  
of Bell's  
Commentaries.

With a meaning similar to that last mentioned, the term "general agent" was employed by Mr. Ross, the learned editor of the 6th edition of Professor Bell's Commentaries. He assumed, apparently, that the terms "general agent" and "special agent" are the exact equivalents of the words "factor" and "agent" as used by Professor Bell; and substituted them accordingly for those words in the former editions. Now a "factor" as the word is used in Scotland, corresponds very nearly to the term "general agent" in its sense implying an extensive general authority such as appeared upon the evidence in *Smith v. McGuire*. But the terms "general agent" and "special agent," as used by Mr. Ross, are likely to mislead by suggesting that the expressions *general agent* and *special agent*, as employed by English lawyers in their strict sense to mark the significant distinction above described, in any way relate to the circumstance that the scope of the authority is large or small.

The passage of Bell's Commentaries to which I have re-

ferred, as it stands in the original, and as restored in Mr. M'Laren's (7th) edition, is a very instructive one, describing a class of agents with a *large* general authority, who are very conveniently marked in Scotland by the name of "Factors," but to whom in England there is no comprehensive term properly applicable.

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Quoting from Mr. M'Laren's (7th) edition (p. 506) the passage runs as follows :—

"A FACTOR is distinguished from a merchant in this, that a merchant buys and sells for his own direct mercantile profit ; a factor only buys or sells on commission. Again, a factor is distinguished from a broker by being entrusted with the possession and apparent ownership as well as with the management and disposal of the property of the principal. He is distinguished from an agent, in his authority being extended to the management of all the principal's affairs in the place where he resides, or in a particular department. He is distinguished from an *institor*, in being in point of law a person separate from his principal ; whereas an *institor* (at least where that term is confined to shopkeepers and clerks) is assimilated in all respects to his master, so far as relates to his transactions in that character. A factor is generally the correspondent of a foreign house, or of a merchant or manufacturer at a distance from the place of sale : and he usually sells in his own name, without disclosing that of his principal and has an implied authority so to do. He receives consignments on the one hand and makes sales and remittances in return, proceeding for a considerable course of time, and balancing at regular intervals his accounts with his principal ; and in general he gives a *del credere* guarantee, and has a commission for it. Sometimes he makes large advances on goods consigned to him, while the sales of those goods are either made in his own name, or bills are drawn by his principal on the buyers, payable to the factor ; or the bills are drawn by the principal, and sent to the factor to procure acceptance, with blank endorsements. The goods entrusted to a factor or agent, or the price of them, are implicated for his advances, and liable to retention for the general balance.

"Factor" and  
"Agent."  
Professor Bell

"AN AGENT is one entrusted with the accomplishment of a

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particular act or course of dealing; as the riding agent of a manufacturing house for taking commissions, or a supercargo sent out with goods to sell or dispose of them, or one appointed specially to manage the sale of a cargo, the purchase of a commodity, or the effecting of an insurance. His powers within the range of the thing committed to him, unless where expressly limited, are similar to those of a factor.

"These are, strictly speaking, the true descriptions of agent and factor, as contradistinguished. But the names are generally confounded in common speech, factors being included under the name of agents."

Professor Bell then goes on to describe the functions of *brokers*, as a different class from those styled "agents" in the limited sense, as well as from "factors;" and then, as a remark equally applicable to all these kinds of agents, he says:—"If the powers are special, they form the limits of the authority. If general, they will be more liberally construed, according to the necessity of the occasion, and the material or ordinary or reasonable course of the transaction and usage of trade." He does not however attempt to define what is meant by general and what by special powers.

Various classes  
of mercantile  
agents.

Having indicated the distinction in principle between a general agent and a special agent, I shall, independently of that distinction, advert to certain large and important classes of agents concerned with commercial dealings, and herein I shall consider the presumptions established by usage in respect to each. These classes are, 1. *Factors* (as understood in England) 2. *Auctioneers*. 3. *Brokers*, under which principal head I shall deal particularly with three important classes, of *Brokers for sale*, *Insurance* (i.e., marine insurance) *brokers*, and *Stock brokers*. 4. *Masters of Ships*. And, 5. (The most important of all) *Partners*. Under this last head I shall also advert very briefly to *directors* and other agents of *companies* and *corporations*.

Before, however, dealing in detail with the particular kinds of agency, I shall state very briefly a few principles of general or extensive application.

The presumed authority of a wife, as agent for the husband, to pledge his credit for goods supplied, has lately undergone very full discussion and consideration by the Court of Appeal, with the result that the presumption arising from the mere fact of goods being ordered by a wife who is living with her husband, is much more restricted than has been popularly supposed.

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Presumption as  
to a wife's  
authority.

The case is *Debenham v. Mellon*, reported 5 Q. B. D. 394 ; and the question arose upon certain articles of dress supplied to the wife, which, it was not disputed, were "necessaries" in the sense that they were suitable to her degree and condition in life. The defence by the husband was that he made his wife an allowance of 52*l.* a year to supply herself and her children with clothes, and that he had positively forbidden her to exceed it. Mr. Justice Bowen, who tried the case, left it to the jury to say whether at the time the goods were ordered, the defendant had withdrawn his wife's authority to pledge his credit, and had forbidden her to do so. The jury answered this question in the affirmative, and judgment was given for the defendant.

This judgment was on appeal, affirmed by the Court, consisting of Lords Justices Bramwell, Baggallay and Thesiger. There was substantial unanimity of opinion. Judgments were delivered at length by Lords Justices Bramwell and Thesiger. Lord Justice Baggallay concurred entirely with the latter ; and stated that the observations made by the former, which dealt generally with the presumptions relating to the authority of the wife, were substantially in accordance with the views entertained by him.

The following extracts (5 Q. B. D. 398—400) will sufficiently show the principles laid down by the judgment of Lord Justice Bramwell :—

"No doubt, there are cases in which a wife has what is called an agent's authority to bind her husband. I think it convenient to mention the following instances, though, of course, we have not to deal with them here. If a husband turns his wife out of doors, or conducts himself so that she is obliged to leave him, it is a legal duty upon him to maintain her ; and if he will not himself perform that duty, she has

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power to provide for herself at his expense, that is to say, she can pledge his credit for necessities, such as food, apparel, lodging, and perhaps medicine and physic. In like manner when a wife is living with her husband, if he gives her nothing but the shelter of his house, she would have a right to provide food and apparel for herself at his expense, and he would be bound to pay for them. In cases such as these a wife has undoubtedly power to bind her husband. There may be cases in which a wife has a similar power when she and her husband are living and cohabiting together, and where the article bought upon credit is of such a kind and character that persons living in the same class of life with themselves, and having the same means, and living in the same neighbourhood, are in the habit of ordering it upon credit. Take the case of an ordinary butcher's bill: if it is not the practice of persons belonging to a particular class of life (and undoubtedly sometimes it is not), living in certain neighbourhoods in a certain style, to pay for each joint of meat at the moment of its delivery, and if the practice is to have weekly, monthly, or quarterly bills, it seems to me that the wife in such a case would have a presumable authority; and if the husband means to negative it, he not only must give her notice that he withdraws it, but also must inform the tradesmen in the neighbourhood with whom she might deal that the presumable authority has been withdrawn. It seems to me that the authority exercised by a wife in a case such as I have mentioned does not spring merely out of the contract of marriage, but that the same authority would exist in favour of a sister, or a housekeeper, or other person presiding over the management of the house. \* \* \* However that may be, the facts before us are of a different kind. In this case it cannot be pretended that there was any convenience in supplying the goods upon credit, nor has any practice or usage to that effect been proved to exist. Certainly, the Court cannot take judicial notice of a practice by wives to pledge their husband's credit for dresses, and I sincerely hope that in point of fact it is not their practice to do so. The question is whether, there being no usage to warrant a dealing upon credit, and there being no authority but an actual prohibition on the part of the husband, his wife is nevertheless entitled to pledge

his credit. \* \* \* Why should she have that power? Let me look at the position of all the parties. If a husband is desirous that his wife should have that power, he can give it to her in express terms: so far as he is concerned, it is unnecessary that the law should confer the power upon his wife. As to the tradesman, he need not deal with the wife upon credit, he need not trust her, he can carry on his business for ready-money only. He may take another course: he need not treat the husband as his debtor: he may trust the wife only and reckon upon her getting the money to pay him from her husband. But also the tradesman can ask whether the wife has her husband's authority: if she says that she has, when in truth she has not, she would commit a fraud; and if the tradesman takes this precaution, she must commit a dishonest act in order to obtain the goods. And the tradesman may take a step further and refuse to trust the wife, unless the husband acknowledges either by word of mouth or in writing that he has conferred authority upon her. The tradesman is not under an obligation to trust the wife; and if he chooses to look to the husband for payment, why should he not be bound to obtain the authority of the husband before the goods are supplied for which the latter is to be held liable? It is argued that if a tradesman were to ask this question, he would offend his customers: the wife would not deal with him again, and the husband also might be annoyed that his wife's word had been doubted. This may be a reason why the tradesman should not ask the question: but it is no reason why if he does not, he should hold the husband liable when the latter has not consented that a debt should be contracted."

The following extracts (pp. 401—404) will give the gist of the judgment of Lord Justice Thesiger:—

"The state of facts upon which the judgment of the Court is to proceed I take to be as follows: a husband and wife living together: the husband able and willing to supply the wife with necessities, or the means of obtaining them: an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit: a tradesman, without notice of that agreement, and without having had any previous dealings with the wife with the husband's assent, supplying her,

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upon the credit of the husband, but without his knowledge or assent, with articles of female attire suitable to her station in life: an action brought against the husband for the price of such articles.

“The question for us is whether the action is maintainable. I agree with the other members of the Court, and with Bowen, J., that it is not. The appellants’ counsel have brought under our notice a considerable number of authorities with the view of establishing that the law as laid down in *Jolly v. Rees* (15 C.B. N. S. 628) is erroneous. I think that the authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based in the main upon the ordinary principles of agency. It follows that he is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorised her to pledge his credit, or has so conducted himself as to make it inequitable for him to deny, or to estop him from denying, her authority. In the present case express authority is out of the question, and there is no evidence that the defendant ever assented in any way to the act of his wife in pledging his credit to the plaintiffs.

“But it is said that there is a presumption that a wife living with her husband is authorised to pledge her husband’s credit for necessaries; that the goods supplied by the plaintiffs were, as it is admitted they were, necessaries; and that, as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term ‘presumption’ in cases where it has been used with reference to a wife’s authority to pledge her husband’s credit for necessaries. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband’s credit and suing him, makes out a *prima facie* case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husband’s credit in respect of matters coming within those departments. Such a presumption or *prima facie* case is rebuttable, and is



rebutted when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency, upon which, *ex hypothesi*, the liability of the husband is founded, would be practically of no effect."

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After pointing out that in the case of a dealing with a tradesman for the first time there can be no *holding out* by the husband, he proceeds:—

"It is urged that it is hard to throw upon a tradesman the burden of inquiring into the fact of a wife's authority to buy necessities upon her husband's credit. I assent to the answer that while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder, and is contrary if not to public policy yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect to which even after such advertisement he may be made liable to a tradesman who is able to swear that he never saw it.

"It appears to me that the decision of the majority of the judges in the case of *Jolly v. Rees* (15 C. B. N. S. 628) has put the law as regards this matter upon a proper footing, and that there is no ground for disturbing the judgment in this case which the defendant has obtained."

To the reciprocal duties between principal and agent I shall only refer very briefly.

Reciprocal  
duties and rights  
as between  
agent and  
principal.

The duty of the agent to his principal includes, it need hardly be said, that of executing his mandate faithfully, and with reasonable care<sup>1</sup> and skill, having regard to the nature of the employment; and, if he has received money or property by reason of the employment, he must account to the principal accordingly.

The right of the agent, as against the principal, comprises in the first place the right to be reimbursed for all payments

<sup>1</sup> An agent specially authorised to do an act in itself imprudent, and one which the principal ought not, as a matter of prudence to have authorised, is not to be held responsible for the consequences of doing it. *Overend and Gurney Co. v. Gibb*, L. R. 5 H. L. 480.

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made by him, and to be *supplied with funds to meet*<sup>1</sup> all liabilities incurred by him by reason of the employment.

The agent is in the next place entitled to be paid (or if a factor to retain) the remuneration for his employment, generally in the shape of a commission or percentage on the amount of the transaction. The amount of this may be fixed by express contract, but is more usually determined by the usage of the particular trade.

Any further profit which the agent may handle out of the transaction, belongs to the principal, and must be accounted for by the agent accordingly (*Kimber v. Barber*, L. R. 8 Ch. 56; *Morison v. Thompson*, L. R. 9 Q. B. 480; *Parker v. McKenna*, L. R. 10 Ch. 96; *Imperial Mercl. Credit Association v. Coleman*, L. R. 6 H. L. 189; *In re Imperial Land Co. of Marseilles, Ex parte Larkins*, 4 Ch. 566; *Bagnall v. Carlton*, 6 Ch. D. 371; *De Bussche v. Alt*, 8 Ch. D. 286; *Williamson v. Barber*, 9 Ch. D. 529; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918). The only point in most of the cases here cited on which there was any real question was whether the defendant was an agent at the time the profit was handled or stipulated for. Agency once established, there really was no legal question left.

## SECTION II.—VARIOUS CLASSES OF AGENTS.

### 1. *Factors*.

A factor, in English law, is a general agent having goods placed in his hands for sale.

A *factor*, as the term is used in English law, is a general agent having authority to sell, and to whom for that purpose is given the control of the bulk, whether by actual possession, or by having the goods shipped or warehoused at his disposal (*Baring v. Corrie*, 2 B. & Ald. 137, 143, 148). He has a property in the goods by way of security for the balance due to him by the principal on general account, and his mandate for sale is doubtless irrevocable by the principal without the

<sup>1</sup> I use this expression as more exact than "indemnified against," which is perhaps more often used; but which becomes inadequate and misleading in the case where the

agent is unable out of his own resources to meet the liabilities. See the comments hereafter made on *Cruse v. Payne* (p. 461, *post*.)

consent of the factor, so far as relates to the interest of the latter in the goods.

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As already shown, the principal is bound by the acts of his general agent within the scope of that authority which may fairly be inferred from the instances of employment. Consequently the principal is bound by the acts of the factor within the scope of the authority inferred either from the course of dealing by which the particular agent is accredited, or from the usage of trade with regard to factors.

And therefore binds the principal by acts within the scope of his authority.

Further, upon the principle of estoppel, a person may by his acts so *hold out* another as his factor as to be bound by the acts of the person so held out, although not only were the acts without instructions, but although no authority of the kind really existed (*Pickering v. Busk*, 15 East, 28 ; *Dyer v. Pearson*, 3 B. & C. 38, *per* Abbot, C.J.). In the case of *Pickering v. Busk* (15 East, 28), Swallow, a person whose ordinary business it was to buy and sell hemp, and who was in the habit of doing this for others concealing the names of his principals, purchased for the plaintiff a parcel of hemp ; and this parcel was at the plaintiff's desire, transferred in the books of the wharfinger's into Swallow's name. Swallow afterwards, but without any authority from the plaintiff, sold the hemp and received the price of it in the ordinary course of his trade, and afterwards became bankrupt. In an action against the purchaser, it was held that the plaintiff, having clothed Swallow with apparent authority to sell the hemp and receive the price, was bound by Swallow's act.

Doctrine of *holding out* as applied to factors.

*Pickering v. Busk.*

By an established usage of trade, the factor is presumed, as within the scope of his general authority, to have power to sell the goods in his own name, *and as if he were principal* in the contract. Consequently the purchaser from a factor who sells goods in his own name can set off a debt due to him from the factor personally, in the same way as if the factor were the principal, unless the purchaser, at the time of the purchase, has notice that the factor is not the principal ; and this right is not affected by the fact that the factor, in selling in his own name without disclosing the agency, is acting in contravention of the express directions of his principal (*Ex parte Dixon, in re*

Powers of factors implied by usage.

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*Henley*, L. R. 4 Ch. D. 133; see also *Thackrah v. Ferguson*, C. P. Div. 25 W. R. 307).

The factor is further presumed, as incident to his power to sell, to have authority to receive the purchase-money; and therefore the purchaser, although he knows the contract to have been made by the factor as agent for another, is safe in making payment to the factor by cash or cheque in the usual way of business, unless the principal has interposed by requiring payment to himself (*Capel v. Thornton*, 3 C. & P. 351; *Underwood v. Nicholl*, 17 C. B. 239, *per* Willes, J., p. 244; *Hornby v. Lacy*, 6 M. & S. 166, *per* Bayley, J., and Holroyd, J., p. 172; *Fish v. Kempton*, 7 C. B. 687, *per* Wilde, C.J., 692). Even if the principal has so interposed, the factor is entitled, in his own right by virtue of his lien, to receive the purchase-money, if it can be shown that the principal is indebted or under liability to the factor on the transactions between them (*Drinkwater v. Goodwin*, Cowp. 251).

The factor is presumed, as within the scope of his authority, to have power to sell at such time and at such price as he may in his discretion think best (*Smart v. Sanders*, 3 C. & B. 330); and to sell on credit such as is usual in the trade (*Scott v. Surnam*, Willes Rep. 400, 406; *Houghton v. Matthews*, 3 B. & P. 489); and to warrant, if that is the custom of the trade (*Pickering v. Busk*, 15 East, 38, *per* Bailey, J., p. 45). He has presumed authority as agent to insure the goods, as well as an insurable interest by reason of his possession coupled with the power of sale (*Lucena v. Crawford*, 2 B. & P. N. R. 269, *per* Lord Eldon, p. 324). Even if he had not such an interest on those grounds alone, he would in most cases have an insurable interest by reason of his lien (*Wolff v. Horncastle*, 1 B. & P. 316, 321; *Ebsworth v. Alliance Marine Insurance Co.*, L. R. 8 C. P. 956).<sup>1</sup>

<sup>1</sup> The question as to which there was much difference of opinion in this case was whether the right to insure so as to recover in their own names for the benefit of all concerned extended to consignees of goods, who had by letter of credit

undertaken to accept bills of exchange against shipping documents, and who had conditionally accepted them "against shipping documents" accordingly; but the bills of lading being at the time of the loss in the hands of bankers with whom

The factor has not, however, any implied authority to accept or indorse bills so as to charge his principal (*Hogg v. Snaitth*, 1 Taunt. 347; *Murray v. E. I. Co.*, 5 B. & A. 204). Nor does his authority to receive payment extend to a settlement otherwise than by payment in money or cheques in the usual course of business (*Underwood v. Nicholl*, 17 C. B. 239; *Howard v. Chapman*, 4 C. & P. 508; see also *Barber v. Greenwood*, 2 Y. & C. 414).

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It has been seen how the doctrine of holding out has been sufficient, in such cases as *Pickering v. Busk*, to give the purchaser complete security in dealing with the person assuming to act as factor. The factor being, however, in England, viewed merely as an *agent for sale*, the doctrine has not, as applied by the English common law, given all the security to persons dealing with others having the ostensible possession or control of merchandize, which has been thought desirable in the interests of commerce. It became established as the doctrine of the common law in England, that an agent having general authority to sell, although having possession of or control over the bulk, has no implied authority to *pledge* the goods (*Paterson v. Tush*, 2 Str. 1178; *Boyson v. Coles*, 6 M. & S. 14);—and it was further decided at common law that the act of a factor pledging the goods *as his own* is so totally tortious, as not even to transfer the right which the factor had in security of his advances (*McCombie v. Davies*, 7 East, 5, cited in *Donald v. Suckling*, L. R. 1 Q. B. 607, and in *Cole v. N.-W. Bank*, L. R. 10 C. P. 364). The effect of these decisions was only partially relaxed

Doctrine of holding out as applied to factors by English law, limited to power to sell.

At common law in England no authority to pledge.

*they had been pledged by the consignors as security for the acceptance and due payment of the bills. According to the judgment of Bovill, C.J., and Denman, J., the consignees were entitled to recover on their insurances so made the whole loss, so as to indemnify themselves and hold the balance in trust for the other persons interested. According to the judgment of Brett and Keating, JJ., they were entitled to recover only to the*

*extent of their advance of £3,000 and their expected commission. With all deference to the authorities cited in the latter judgment, it is difficult to see any reason why the title of the consignee, as regards an insurance to be effected by him, should depend upon the existence of an incumbrance in favour of another, which it is in the power of the consignee at any moment to redeem.*

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by the earlier Factors Acts, and was not destroyed until the Act 5 & 6 Vict. c. 39.

This subject has at different times occupied the attention of the Legislature, and the Acts just referred to, commonly called the Factors Acts, have been from time to time passed, with the object, as may be conjectured, on the part of their promoters, of giving to merchants who deal on the faith of appearances, some greater protection than is afforded by the common law.

The Factors Acts  
prior to 39 & 40  
Vict. c. 39.

The Factors Acts prior to the 39 & 40 Vict. c. 39, to which I shall refer further on, are these, namely, 4 Geo. IV. c. 83 (1823); 6 Geo. IV. c. 94 (1825), and 5 & 6 Vict. c. 39 (1842). The two earlier Acts, in effect, define the conditions under which an agent is held out as having authority to sell; and under these Acts it was held that an agent whose usual business it is to sell goods and receive payment for them is, if in possession of the goods in bulk, or of the documents giving the control over them, clothed with the apparent authority to sell (*Baines v. Swainson*, 4 B. & S. 270). But it may be doubted whether the Acts, as construed by the decisions, really extend the common law doctrine. The Act of 5 & 6 Vict. further effected what the promoters of the earlier Acts vainly endeavoured, namely to confer upon factors the implied authority to pledge or create any right in security over goods, as well as to sell them. This was done subject to the proviso that the transaction is in the ordinary course of business, and for an advance, and not in security of an antecedent debt (*Heyman v. Flewkes*, 13 C. B. N. S. 519; *Jewan v. Whitworth*, L. R. 2 Eq. 692; *Portalis v. Tetley*, L. R. 5 Eq. 140; *Vickers v. Hertz*, L. R. 2 Sc. Ap. 113). The same Act, by sec. 4, makes the possession by an agent of the goods or of the documents giving the control over them, *prima facie* evidence of his employment in the character of a factor, having authority to dispose of the goods (*Baines v. Swainson*, 4 B. & S. 270, *per* Blackburn, J., p. 285).

Have often  
proved a snare  
to the party  
relying  
upon them.

Beyond the effects just mentioned I am not aware that the Factors Acts (prior to the Act 40 & 41 Vict.) have had any practical result. And the cases where they have been unsuccessfully relied on are very numerous. The following are instances:—

In *Monk v. Whittenbury* (1831), 2 B. & Ad. 484, defendant had purchased flour from C. who was a wharfinger, and who had received the flour in question from the owner in that capacity. It was indeed proved that C. dealt also with some persons as a flour factor, but the verdict of the jury who found that the sale was not in the ordinary course of business, appears to negative the inference that such course of dealing was general.—In *Fletcher v. Heath* (1827), 7 B. & C. 517, a broker having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the fact that he was an agent. It was held that he could transfer (if any right at all) only the right which he had, namely a security for his indemnity against the bills, and the owner having paid the bills was entitled to have the goods back from the pawnee.—In *Evans v. Trueman* (1831), 2 B. & Ad. 886, a person relying on the protection of 6 Geo. IV. c. 94, s. 2, giving validity to a *contract* for sale or pledge, was held bound to produce the contract on which he relied, as it was proved to be in writing.—In *Taylor v. Kymer* (1832), 3 B. & Ad. 320, and *Bonzi v. Stewart* (1842), 4 M. & G. 295, it was held that the protection of the Act did not extend to the exchange of goods or documents giving control over them, held in pledge.—In *Robertson v. Kensington* (1830), 5 M. & Ry. 381, it was held that the power of a factor under 6 Geo. IV. c. 94, s. 5, to pledge the goods of his principal depended on whether on the balance of the whole account between them, the principal was indebted to the factor.—*Phillips v. Huth* (1840), 6 M. & W. 572, and *Hatfield v. Phillips* (1842), 9 M. & W. 647, were cases arising out of a fraudulent pledge of dock warrants by a factor, and in which the Factors Act, 6 Geo. IV. c. 94, was unsuccessfully relied on. *Phillips v. Huth* was compromised, but *Hatfield v. Phillips* was taken on appeal to the House of Lords where it was affirmed, 12 Cl. & Fin. 343. Pending the appeal, the Act 5 & 6 Vict. c. 39 was passed to prevent the hardship of similar cases in future.—*Learoyd v. Robinson* (1844), 12 M. & W. 745, was a case where the transaction relied on as a pledge under the Act 5 & 6 Vict. c. 39, s. 1, was at the suggestion of the judge who tried the case, found by the

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Cases prior to  
to the Act 40 &  
41 Vict. c. 39.

jury to be merely a circuitous way of paying a bill of exchange on which the defendant, the alleged pledgee, and the factor were both liable. On a similar principle it was held by V.-C. Wood, in *Macnee v. Gorst*, L. R. 4 Eq. 315, that where goods were pledged by a factor to secure payment of his own acceptance in the hands of the pledgee, the transaction was not protected. — *Jenkins v. Usborne* (1844), 7 M. & G. 678, 700 (tried in 1842 and therefore before the Act 5 & 6 Vict.), and *Van Casteel v. Booker* (1848), 2 Exch. 691, are cases which show that the then existing Acts do not apply to a transaction with a person not assuming the character of agent, but holding the goods in his own right. — *Lamb v. Attenborough* (1862), 1 B. & S. 831, shows that the Acts do not apply where the relation between the owner and the person appearing to have control of the goods is that of *master and servant*. — *Wood v. Rowcliffe*, 6 Ha. 183, shows that the Acts only apply to mercantile transactions, and do not apply to an advance made on the security of furniture apparently owned by the occupier of a furnished house. — *Kingsford v. Merry* (1856), 1 H. & N. 503, and *Hardman v. Booth* (1863), 1 H. & C. 803, were cases showing that where a person obtains goods or the documents giving control<sup>1</sup> over them, by a fraud, but without any relation of principal and agent being constituted between him and the owner, he cannot confer any title under the Acts. The same principle is assumed throughout the arguments and decisions in the case of *Fowler v. Hollins* [L. R. 7 Q. B. 616, reported on appeal as *Hollins v. Fowler*, L. R. 7 H. L. 757], and is expressly stated in the

<sup>1</sup> Here as elsewhere I abstain from using the expression "documents of title" to goods. The expression though sanctioned by the Factors Acts is misleading. The title to goods consists in facts, and contracts having the force of contracts. The documents which give warrant to demand the goods from the custodiers, whether shipmasters, wharfingers or warehousemen, are not, generally speaking, part of the title, although they are commonly accessories to the title.

But in certain cases they, along with other facts, constitute a title in the holder. These cases are, first, When they are relied on on the principle of *holding out*, as in the case of *Pelton v. Busk*; secondly, Under the same principle, as extended by the Factors Acts; and thirdly, By custom of trade, such as that which enables the bona fide holder for value of a bill of lading to defeat the vendor's right to stop *in transitu*.



opinion of Mr. Justice Blackburn as one of the consulted judges in the appeal to the House of Lords (p. 763).

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*Fuentes v. Montes* (L. R. 3 C. P. 268; 4 C. P. 93), was a very important case, where it was held that an agent who had been intrusted with goods for sale, but who wrongfully retained them after the owner had demanded them to be delivered up to him, could not make a valid pledge of them.

*Fuentes v.  
Montes.*

*Cole v. North-Western Bank* (9 C. P. 470, and 10 C. P. 354) was a case not unlike *Monk v. Whittenbury* (*supra*, p. 413), and the effect of this decision (which overruled so far as relates to the Factors Acts the decision of the Chief Judge Bacon upon the same facts in *Ex parte North-Western Bank, In re Slee*, L. R. 15 Eq. 69), was to confirm and extend the principle of *Monk v. Whittenbury*, notwithstanding the later Acts. An agent *was proved* to have received the goods in question (sheeps-wool and goats-wool) *in the character of a warehouseman*. He was also proved to have been *in the habit* of acting as broker for sheeps-wool: and by the judgment of Mr. Justice Blackburn in the Court of Exchequer Chamber, in which his brother judges, Mellor, Lush, Cleasby, Pollock and Amphlett, appear to have concurred, the inference was drawn that the agent might in the ordinary course of his business as broker, have goods transferred into his own name in security of advances to his principal, and so might act in a character similar to that of a factor. It was held by the Court of Exchequer Chamber, affirming the judgment of the Common Pleas, that a pledge by this person of the wool with which he had been entrusted solely as warehouseman, was invalid.

*Cole v. North  
Western Bank.*

In the judgment pronounced, as above-mentioned, by Mr. Justice Blackburn, all the authorities both before and after the Act 5 & 6 Vict. c. 39, were elaborately reviewed, and it was laid down broadly (L. R. 10 C. P. 369), that under this Act it was not intended that a warehouseman or wharfinger who, as such, is intrusted with the custody of goods, if he happens also to pursue the trade of a factor or commission-agent, can give a better title by the sale of goods than he could if they had been intrusted to some other warehouseman who employed him to

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sell. It was the opinion of the judges who concurred in this judgment (p. 368), that the Legislature by this section intended to confirm the common law as laid down in *Pickering v. Busk*, but did not mean to extend it to all cases in which any person is intrusted with the custody of goods though that person may in one sense be an agent for the intruster. The following passage from the same judgment may be quoted as a summary of the effect and intention of these Acts in the opinion of these judges:—"The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The Legislature seems to have wished to make it the law that, where a third person has intrusted goods, or the documents of title to goods, to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled anyone who *bond fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorised to sell or procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the Act, we think they have not used language sufficient to express an intention so to enact."

A separate judgment was delivered by Baron Bramwell, arriving at the same result, but upon somewhat narrower grounds. He did not, apparently, admit the inference that the agent in the ordinary course of his business as broker, might have the control of the goods: and being of opinion that the goods were proved to have been in fact intrusted to the agent as warehouseman, he considered that the Factors Acts did not apply to the case.

*Johnson v.*  
*Crédit Lyonnais.*

The case of *Johnson v. Crédit Lyonnais* and *Same v. Blumenthal*, in the Court of Appeal, Dec. 1st, 1877 (L. R. 3 C. P. Div. 32), decided subsequently to but on facts which arose before the passing of the Act 39 & 40 Vict. c. 39, is another

instance of the narrow construction put upon the word “intrusted” in these Acts.

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H, a broker in the tobacco trade, but who also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the warehouses of the St. Katherine's Dock Co., receiving the usual dock warrants, and the tobacco was entered in the books of the company in H.'s name. H. sold this tobacco to the plaintiff, who paid for it, but left it in bond to be forwarded to him or his vendees as required. The tobacco accordingly remained in the dock books in H.'s name and the warrants remained in H.'s possession. H. then fraudulently, by means of the warrants, pledged this tobacco to the defendants, who completed their security by getting the tobacco transferred in the books of the company to their names, and getting fresh warrants from the company to themselves. It was held that H. was not *intrusted* with the warrants within the meaning of the Factors Acts, nor was the fact of the plaintiff's leaving H. in possession of the warrants imputable, either by way of *representation* or by way of negligence, so as to prevent his setting up his title in competition with the pledgees.

The scope of the Factors Acts is now further extended by the Act of 1877 (40 & 41 Vict. c. 39), which proceeds on the preamble that doubts have arisen with respect to the true meaning of certain provisions of the Factors Acts, and it is expedient to remove such doubts and otherwise to amend the said Acts, for the better security of persons buying or making advances on goods or documents of title to goods, in the usual and ordinary course of mercantile business.

Act to amend  
the Factors  
Acts, 40 & 41  
Vict. c. 39.

The 1st section of this Act refers to the prior Acts as the “principal Acts,” and enacts that those Acts and the present Act may be cited for all purposes as the “Factors Acts, 1823 to 1877.”

The second and subsequent sections of the Act are as follows:—

“2. Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title

Amendment of  
law with respect  
to secret revoca-

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tion of entrust-  
ment or agency.

With respect to  
vendors per-  
mitted to retain  
documents of  
title to goods.

With respect  
to vendees per-  
mitted to have  
possession of  
documents of  
title to goods.

With respect  
to transfers of  
documents of  
title.

to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his entrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.

"3. Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent entrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person entrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

"4. Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession, or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act, shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

"5. Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bond fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating

by vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

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"6. This Act shall apply only to acts done and rights acquired after the passing of this Act."

Act not to be  
retrospective.

It should be mentioned that the term "document of title" is defined in the Act 5 & 6 Vict. c. 39, s. 4, as follows:—"Any bill of lading, *India* warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act."

It will be observed that the 2nd section of the Act 40 & 41 Vict. c. 39, is directed to meet, and was doubtless suggested by the circumstances which occurred in the case of *Fuentes v. Montis* above considered. The 3rd section will alter the result in circumstances such as those of *Johnson v. Crédit Lyonnais*. The 4th section puts a converse case. The effect of the 5th section has been adverted to, p. 374, *supra*.

This Act, 40 & 41 Vict. c. 39, has doubtless much extended the circumstances under which persons dealing in the ordinary course of mercantile business may rely upon the documents as representing the title to the goods. But the Legislature has (no doubt advisedly) stopped short of giving these documents a character in the nature of negotiable instruments. Such cases therefore as *Cole v. North-Western Bank* (p. 415, *supra*), where the goods are entrusted to a warehouseman as such; or of a fraudulent broker dealing under pretence of a non-existent agency, as in *Hollins v. Fowler* (L. R. 7 H. L. 757, 763); or of the tanner in *City Bank v. Barrow* (a Canadian case, 5 App. 664), appear to be still beyond the scope of the Factors Act.

It has been stated (p. 395, *ante*) that if an agent is empowered by his principal to employ an agent under him, the principal

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*New Zealand  
and Australian  
Land Co. v.  
Ruston.*

may be bound, as regards third parties, by the acts of the sub-agent. It does not follow that any privity is created between the principal and the sub-agent.

A very important case in regard to the position of a sub-agent for sale employed by a factor, with the knowledge and allowance of the principal, is that of *New Zealand and Australian Land Co. v. Ruston* (5 Q. B. D. 474, reversed by C. A., 28 March, 1881, 50 L. J. 433, Q. B. D.), in which a decision of Mr. Justice Field was reversed by the Court of Appeal. M. & Co., merchants in Glasgow, who were employed by the plaintiffs as their consignees and factors in Great Britain, were in the habit of employing the defendants as brokers for sale of the produce consigned. The employment of the defendants was not expressly authorised by the plaintiffs, but it was known to them that the sales were effected by means of sub-agents. The defendants moreover knew that their own immediate principals were acting as agents for others, and not as principals. The course of business was that M. & Co. on receiving the endorsed bills of lading from the plaintiffs sent them endorsed to the defendants, who charged them a commission on the sales. M. & Co. delivered to the plaintiffs from time to time account sales, debiting them with expenses and a *del credere* commission, and sending the balance by cheque. M. & Co. stopped payment before having accounted for some of the later cargoes; and the plaintiffs claimed to intervene and receive from the defendants the proceeds of those cargoes, without admitting a set-off which the defendants claimed on the state of their accounts with M. & Co. It was held by Field, J., that they were entitled to the net proceeds in the hands of the defendants without any set-off—1st, on the ground that the plaintiffs were entitled to intervene as if the defendants were their own agents, and 2ndly, that the goods and the proceeds of them being held by the sub-agents in a fiduciary character, the plaintiffs were entitled to follow them in their hands. But the Court of Appeal (Bramwell, Baggallay and Brett, LJJ.), reversed this decision on both points; and the judgment of Lord Justice Bramwell is important and instructive. He showed that the right of intervention only subsisted where a contract was made by a broker because the

broker is employed to make the contract between two principals, whereas in the present case M. & Co. were not employed to make a contract of brokerage between the plaintiffs and the defendants. As to the question of following the proceeds, he observed that he should be sorry to introduce the doctrine of trusts and fiduciary relations into commercial transactions—into matters of contract such as these;—and that there was indeed no relation of trustee and *cestuis que trust* in the case.

As closely connected with the subject of factors and consignees I here revert as I anticipated in a former place (p. 300, *ante*) to the important doctrines laid down in regard to *consignors* as agents in the case of *Ireland v. Livingston* (L. R. 5 H. L. 406). I here continue the quotation from Mr. Justice Blackburn's opinion, where I left it off:—"It is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a positive fraud if, having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit; nor can I doubt that in an action brought against him as an agent for not accounting properly, this extra sum would be disallowed.

Duties of consignor as agent.

"The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no way an element in the limit. But when, as in the present case, the limit is made to include cost, freight, and insurance, the agent must take care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does the

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principal is not bound to take the goods. If by due exertions he can execute the order within those limits he is bound to do so as cheaply as he can, and to give his principal the benefit of that cheapness. The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission because there is a contract of agency."

He concluded by showing that the defendants, in the case in point, had fulfilled this duty as agents by buying in large or small quantities from time to time as they were able.

Agent entitled to benefit of *bond fide* construction of order of uncertain meaning.

The case was heard on the ultimate appeal by Lord Chelmsford, Lord Westbury and Lord Colonsay, who concurred generally in the views expressed by Mr. Justice Blackburn, but decided the case on a new ground. Assuming from the difference of opinion amongst the judges that the order was one of doubtful construction, they considered that was sufficient to exonerate the agent for having adopted one of the constructions of which the document was fairly capable. This is put by Lord Chelmsford (L. R. 5 H. L. 416) thus:—"If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bond fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms."

## 2. Auctioneers.

An auctioneer is agent for public sale.

An auctioneer is an agent for the public sale of property. According to established usage he is, until the fall of the hammer, the agent of the seller alone. On the fall of the hammer he becomes the agent for both parties to strike the bargain, and is further authorised, as the agent of both parties, to do what is necessary to bind the bargain according to the Statute of Frauds (see p. 223 and p. 224, *ante*; *Emmerson v. Heelis*, 2 Taunt. 38, 48; Benjamin on Sales, 2nd ed. p. 201).



An auctioneer (properly so called<sup>1</sup>) of goods has the *possession* of the goods which he is employed to sell; and he has a special property in them, by way of a lien over the goods or their price, for his charges. He is, therefore, in the absence of a stipulation to the contrary in the conditions of sale (*Sykes v. Giles*, 5 M. & W. 645) authorised and entitled, on delivery of the goods, to receive payment in money for them, and to sue in his own name for payment (*Williams v. Millington*, 1 H. Bl. 81.) He has no implied authority to receive payment by bill; though, doubtless, it would be held within his authority to receive payment by cheque, so as to be a good payment provided the cheque is duly honoured (*Williams v. Evans*, L. R. 1 Q. B. 352, and see *Bridges v. Garrett*, L. R. 5 C. P. 451).

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Has possession  
and a lien.  
His powers.

According to Story, p. 107, the auctioneer's "verbal declarations at the sale, at least where they do not contradict the particulars of sale, are admissible against the principal and binding on him, as an incident to his authority to sell." If this means that such statements, though in fact unauthorised, bind the vendor as being within the scope of the auctioneer's authority, I do not find in the cases any authority for the proposition. And in a recent case upon a contract for the sale of land, it was decided that an unauthorised but not wilful misrepresentation by the auctioneer at the time of sale will not afford any ground for relief after the completion of the purchase (*Brett v. Clowser*, 5 C. P. D. 376). If it were the case that in a sale of goods by auction, the auctioneer had any implied authority to warrant, I should have expected to find some positive decision to that effect. The negative part of Mr. Story's proposition, namely, that any declaration of the auctioneer at the time of sale is inadmissible in evidence to contradict the printed particulars or conditions, is clearly borne out by the cases, particularly by *Gunnis v. Erhart*, 1 H. Bl. 289; *Powell v. Edmunds*, 12 East, 6; and *Ogilvie v. Foljambe*, 3 Meriv. 53, 65.

Has he any  
implied power  
to warrant?

<sup>1</sup> This qualification is meant to exclude mere *brokers* of produce, who frequently conduct their sales somewhat in the fashion of an auction, but are in possession

merely of samples, the goods not being on the premises where the sale takes place. Bell's Comm. Shaw's ed.

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Brokers  
generally.

3. *Brokers.*

The term *broker* in its largest sense is applied to a person who acts as the medium of negotiating and contracting any kind of bargain. Thus there are ship-brokers, who are concerned with charter-parties and contracts of affreightment; insurance brokers, &c. The term is, however, emphatically applied to persons whose business is to negotiate and effect contracts of sale between merchants. I shall deal with them under the name of *brokers for sale*; and I shall also deal particularly with *insurance brokers* (i.e., brokers for marine insurance), and *stock brokers*.

*Brokers for Sale.*

Brokers for sale.

A broker for sale is an agent to sell or purchase goods for another, but he is not, like a factor, intrusted with the possession or control of the goods or the documents of title to them; and he is not, according to the usual course of business, authorised, and is therefore presumed not to be authorised to contract in his own name. He has not, even if he has stipulated in lieu of brokerage for a share of the profit, and to be liable to a share of the losses, any *property* in the subject of sale (*Smith v. Watson*, 2 B. & C. 461). Nor is there, by the mere fact of employment as a broker, any presumption of a general authority. *Prima facie* he is a special agent (*East I. Co. v. Hensley*, 1 Esp. 112); but a general authority of limited extent may easily be inferred from a course of dealing (*Townsend v. Inglis*, Holt, N. P. C. 278). There is no presumption from the mere employment of a broker that he is authorised to receive the price (*Baring v. Corrie*, 2 B. & A. 137). But if the principal chooses to remain undisclosed until the time of payment arrives, the buyer seems entitled to pay the broker according to the terms of the contract (*Campbell v. Hassall*, 1 Stark. 233, and *Morris v. Cleasby*, as there cited).

As described by  
Blackburn.

A broker for sale is described by Mr. Blackburn (p. 81) as "a person making it a trade to find purchasers for those who wish to sell and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them;" and this definition is cited and adopted by Mr. Justice Hannen in *Mollett v. Robinson*, L. R. 7 C. P. 84, 97.

"In practice," the learned author above cited further observes, "he who employs a broker very often gives him a discretion as to the terms on which he is to sell or buy, and when this is the case the broker has to promote an interest hostile to that of the other side. The vendor seeks to sell dear, the purchaser to buy cheap, and it would be a fraud in the broker to undertake to promote at once these opposite interests; the broker therefore cannot act as agent for both parties in settling any of the terms of the contract, unless both parties agree to submit to him as umpire on some point." This is doubtless correct in law, but I apprehend that in case of a broker receiving concurrent orders from a seller, each with a limit so as to leave a margin, such orders would be easily construed (either with or without evidence of usage in the particular trade) as implying an authority to the broker to settle the terms within the limits *fairly* according to the market price at the time. However this may be, it is clear that no person is justified, either by usage or otherwise, in representing himself as a broker or agent for a seller or buyer, and at the same time himself acting as the real buyer or seller on the other side (*Ex parte Dyster*, 2 Rose, 349; *Rothschild v. Brookman*, 5 Bli. N. S. 165; *Waddell v. Blockey*, 4 Q. B. D. 678; and see judgment of Blackburn, J., in *Mollett v. Robinson*, L. R. 7 C. P. 84, a case to be presently more particularly adverted to). The learned author above quoted proceeds to note an important distinction:—"But though in exercising any discretion as to the terms of the contract, the broker must be agent for one party exclusively, there is nothing to prevent his still being agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get, must be the vendor's agent, and his only, in settling what the price is to be; but when that is agreed upon he may well be the agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law." The principle here laid down is exactly borne out by the decision of *Thomson v. Gardiner* (1 C. P. D. 777).<sup>1</sup>

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Discretion  
allowed to  
broker.

How far can the  
same broker act  
for both parties?

<sup>1</sup> The reader on looking up this case will doubtless observe that the judgment, as reported, as well as the rubric, is inaccurately worded.

It is clear that the doctrine meant to be laid down is exactly that here stated by Mr. Blackburn.

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An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of that interest (*Dunne v. English*, L. R. 18 Eq. 524).

Presumption  
from usage of  
the market.

Where a person sends an order to a broker engaged in a known and established market or trade, for a deal in that trade, he gives authority to the broker to deal according to any well-established usage in the market or trade, whether in fact known to him or not, *provided such usage is fair in itself and does not change the essential character of the broker's employment as such, or of the contract purporting to be made by him on behalf of his principal.*<sup>1</sup>

I shall illustrate this principle afterwards in its relation to insurance and stockbrokers. In the meantime I refer to the case of *Mollett v. Robinson* (L. R. 5 C. P. 646; 7 C. P. 84, reported *sub nom. Robinson v. Mollett*, L. R. 7 H. L. 802), where although there was little divergence of opinion in regard to the principle itself, the judges both in the Court of Common Pleas and in the Exchequer Chamber were equally divided as to the result upon the fact and usage as proved in the case. In the Exchequer Chamber (L. R. 7 C. P. 84) three judges (Mellor and Hannen, JJ., and Cleasby, B.) drew the inference that the so-called brokers were really principals in the transaction; three others (Kelly, C.B., Channell, B., and Blackburn, J.) held that the only effect of the usage proved was to release the broker from the duty of establishing privity of contract between his employers and to allow him to make the contracts between each and himself as sole principal, and that this was a lawful transaction provided that, in pursuance of the order from one principal (*e.g.* the buyer), there really was a corresponding contract made by the broker with some other

<sup>1</sup> The principle is stated by Lord Chelmsford in *Robinson v. Mollett*, L. R. 7 H. L. 836, as follows:—  
“If a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such

usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character.” I have in the text merely varied the statement of the principle, consistent with the authorities, and so as to make its application as comprehensive as possible.

person as seller, and that the broker was not the real seller so as to bring his interest into conflict with his duty.

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On the case being taken to the House of Lords, the balance of opinion turned in favour of the view that the brokers really acted as principals, and it was held that the alleged usage sanctioning such action was so totally at variance with the relation between a broker and the person employing him as such, that the latter having no notice of the alleged usage, could not be bound by it (L. R. 7 H. L. 802). On this point I may also here quote a passage from the joint judgment of the Court of Appeal in the case of *De Bussche v. Alt* (8 Ch. D. 286, C. A.) :—"One matter alleged by the defendant and actually supported by evidence, although in argument admitted to be untenable, ought not to pass without notice and reprobation, namely, an alleged custom or practice in the ports in which the defendant trades, for an agent for sale with a minimum limit himself to take at that limit, and at his own option, the thing he is employed to sell. We cannot but express a hope that the Court will never again hear of such a contention, or have before it such evidence." It may be noted at the same time that there is nothing to prevent a person having property to sell expressly agreeing with another who undertakes to find a purchaser at a certain price, that the person so undertaking may get, whether as commission or otherwise, any further profit he can make out of the property, as remuneration for his trouble in finding a purchaser (*Morgan v. Elford*, 4 Ch. D. 352, 385, C. A.).

No usage can justify a person professing to act as an agent for sale buying on his own account.

When a broker makes a contract within his authority, he is presumably invested with authority both of seller and buyer to see that the terms are clearly understood and made binding in law (Blackburn on Sale, p. 82). As to the manner in which the contract is to be recorded and made binding the ordinary presumption is that the broker has authority to act in the manner in which such agents ordinarily do act.

Mode of contracting by brokers.

Much confusion has arisen as to the nature and effect of the bought and sold notes used by brokers, and the entries made by them in their books.

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"A precise and accurate broker," says Mr. Blackburn, "when he has made a contract reduces the terms to writing and delivers to each party a copy signed by him.

"The copy delivered to the seller is commonly called the sold note; that which he delivers to the buyer is generally called the bought note. *Besides these* he makes an entry in his book" (Blackburn, pp. 88, 89).

I have quoted the passage as a neat and, subject to the following criticism, accurate description of what takes place. The phrases in the first sentence—"reduces the terms to writing" and "delivers a copy" are, however, liable to mislead by suggesting that the terms so reduced to writing constitute *the contract*, and that all documents that follow are merely secondary evidence of the terms so reduced to writing. This is not necessarily, and probably not generally, the case. For although a careful broker will doubtless, as soon as he has made a contract, make a jotting of the terms as a memorandum for his own use and to refresh his memory; and although such a memorandum may be presumed to be authorised so as to make it evidence by way of admission and (if signed) a compliance with the statute of frauds; he does not necessarily thereby reduce the terms to writing *as the medium of consent between the contracting parties* so as to make the writing conclusive evidence of the terms. The jotting made by the broker *may* indeed have this authentic character. For instance, if the broker instructed to sell goods meets with a buyer, and makes a jotting of the sale *which is shown to the buyer and assented to by him as conveying his meaning*, the writing will be conclusive of the terms assented to by the buyer; and there being in the case supposed a *constat* of the seller's authority, the writing is conclusive and the only primary evidence of the terms of the contract. An illustration of this is furnished by the facts in *Durell v. Evans*, 1 H. & C. 174. The memorandum and entry on the counterfoil in that case being made in the presence of the parties, constituted the contract in writing. It was neither a case of bought and sold notes such as are presently to be mentioned, nor of a mere entry in the broker's book. If the writing, whether a jotting or a mere formal entry, is a mere private act of the broker not com-

municated to the parties, it can have no specific virtue in regard to finality. It is in no way essential to the resolve by which the contract is completed; and the reason which makes a writing conclusive where it is the common medium of expression of the intention, is here absent.

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There are several forms of bought and sold notes. The essential varieties (which have been distinguished by Mr. Blackburn, p. 89 *et seq.*, on a comparison of those occurring in the reported cases) may be described as follows :—

Bought and  
sold notes.  
Various forms.

In the most complete form, the note delivered to the seller, called the sold note, begins "Sold for A. B. to C. D.;" and the bought note begins "Bought for C. D. of A. B." Or the sold note, addressed to A. B. begins "I have this day sold for you to C. D.," &c., and *vice versa*. In each note are then set down the terms of the contract; *i.e.*, the goods sold, by qualitative description and quantity, or (as the case may be) by specific description; the price, date of prompt (or day of settlement), and any other terms agreed on: and each note is signed by the broker, as thus:—"E. F. broker." The essential points in this form are that the principal on the other side is named in the note sent to each, and that the broker's character as such appears as part of his signature. The broker who sends a note in this form is not a contracting party, and can neither sue nor be sued upon the contract (*Fairlie v. Fenton*, L. R. 5 Ex. 169).

First, and  
complete, form.

In another form, the sold note begins, "Sold for A. B.," or "Sold for A. B. to our principals," and is signed "E. F. broker," being otherwise similar to that in the first form. Here the principal purchaser is not disclosed. The corresponding form of bought note, where the principal seller is not disclosed, would be in the form "Bought for C. D. &c." In either case the correlative bought or sold note (as the case may be) may, without a variance, contain the names of both principals.

A second form.

Where the broker sends a note in the form last mentioned, it is competent to show that by the usage of the particular trade, the broker is himself liable on the contract (*Humphrey v. Dale*, 7 E. & B. 266; *Dale v. Humphrey*, E. B. & E. 1004; *Fleet v. Murton*, L. R. 7 Q. B. 126; compare *Southwell v.*

Differences in  
effect between  
the above forms.

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*Bowditch*, 1 C. P. D. 374, where there was no proof of such usage); and if such a usage is proved in the case of the buyer's broker not disclosing the name of his principal, his position is (except so far as the usage may allow him to discharge himself within a certain reasonable time naming a principal who is accepted) similar to that of an agent acting on a *del credere* commission from the buyer, that is to say of one who guarantees to the seller the solvency of the buyer (*Morris v. Cleasby*, 4 M. & S. 574).

Another practical difference between the two forms above mentioned is this, that in the first form the production of one of the notes alone (there being no proof of a variance or of the non-delivery of the other note), would be sufficient to show compliance with the Statute of Frauds. A note in the second form would not be a sufficient memorandum, as it would not show who both the parties were.

A third form.

Its effect.

There is a third form of the bought and sold notes, namely, where the note rendered to the buyer is in the form,—“Sold to you by me,” and signed by the broker in his own name, without adding the word “broker.” The effect of this is that the broker makes himself *a party* to the contract, and that he as well as his principal can sue and be sued upon it (*Higgins v. Senior*, 8 M. & W. 834, 844), whether his principal has been disclosed or not (*Calder v. Dobell*, L. R. 6 C. P. 486). The effect of this differs from the second form above mentioned, 1st, as to pleading, in that E. F. is liable to be sued not upon an implied promise but upon the contract itself; 2ndly, as to substance, in that A. B. is not confined to any period for electing between the responsibility of the principal and broker, but may avail himself of the responsibility of both (*Calder v. Dobell*, L. R. 6 C. P. 491).

The case where the broker makes the contract in the form last mentioned is however quite different from the case where an agent contracts as *principal*, holding himself out as the person alone responsible to the other party for fulfilment of the contract, and entitled to demand fulfilment from the other. This distinction chiefly becomes important in questions of set-off (*Warner v. McKay*, 1 M. & W. 592; *George v. Claggett*, 7 T. 359; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38, see p. 409, *supra*, and cases there referred to.



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§ 2.Supposed case  
illustrating con-  
venience of  
third form.

The following supposed case will illustrate the use of this last form of broker's note, as well as the distinction between the contract so made and a contract by a factor who contracts as principal:—A mercantile house (A. & Co.) in London dealing as commission agents for their connections (X. & Co.) abroad are commencing a series of purchases "to arrive" of a particular commodity, of which, according to the private information of X. & Co., there is an increasing demand. The credit and responsibility of X. & Co. is and must remain, in the home market, an unknown quantity, and the inconvenience of their entering into a contract with persons in this country is so obvious as *prima facie* to create a legal presumption that A. & Co. have no authority to make them parties to a contract in this country (*Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605; *Hutton v. Bullock*, L. R. 8 Q. B. 331; *affd.* Ex. Ch. L. R. 9 Q. B. 572; *Die Elbinger, &c. Co., ibid.*, p. 313<sup>1</sup>). A. & Co. accordingly go into the market to buy upon their own credit as principals and employ a broker for that purpose. For obvious reasons A. & Co. do not wish their names disclosed in the transaction. The party (seller) who contracts with the broker is aware that his principals are likely to be persons of credit equal to if not better than the broker's own. Not being however aware who the principals are, and considering the broker to be a person of some credit, the seller is desirous of having the broker bound as a party to the contract and stipulates for a note in the form last mentioned.

I may here remark that when a broker makes a note in the form last mentioned the note must be taken, so far as relates to the broker's character as party to the contract, to be the contract itself. Also that where the broker himself sues upon the contract he cannot employ his own signature to the note to charge the other party under the Statute of Frauds (*Sharman v. Brandt*, L. R. 6 Q. B. 720). Also that in order to charge the principal some evidence of authority to contract in this form appears necessary (*per* Martin, B., in same case, p. 723); although probably slight evidence of such authority will be

<sup>1</sup> *Quære*, whether Scotland is now a foreign country for this purpose. The reason given in *Thom-*

*son v. Davenport*, 2 Smith L. C. 334, is much weakened since the Judgments Extension Act, 1868.

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sufficient (Blackburn on Sale, p. 94; *Kemble v. Atkins*, 7 Taunt. 280; *Johnstone v. Usborne*, 11 A. & E. 549); and a usage in a particular trade that a broker may at the request of the seller make himself liable in this way, is a reasonable and good usage (*Cropper v. Cook*, L. R. 3 C. P. 194). And here I may also note a distinction between the ordinary case of brokers' notes and the case where a document in the form of a bought or sold note is signed by the party to be charged himself, although sent through the medium of a broker. Such a document is either the contract, or at least clear evidence by way of admission of the terms of the contract as against the party signing it, and the fact of the broker having blundered in making out a note purporting to be the correlative sold or bought note is immaterial (*Rowe v. Osborne*, 1 Stark. 140).

Object and  
function of  
bought and sold  
notes.

Were it not that the earlier cases evince so much confusion upon the subject, one would say that the object and function of the bought and sold notes ordinarily used by brokers is apparent from the nature of the case. They inform each of the principals of the contract; and they afford to either principal an opportunity for objecting to the contract purporting to be made by the broker, as not within his authority (*Hawes v. Forster*, 2nd trial, 1 M. & R. 368); or of objecting to the person named as buyer if the sale is on credit (*Hodgson v. Davies*, 2 Camp. 531);<sup>1</sup> and they further afford the presumption that the contract is ratified if no objection is made within a reasonable time (*Chapman v. Partridge*, 5 Esp. 256; *Hodgson v. Davies*, *supra*). And finally if acquiesced in, the notes, being in identical terms,

<sup>1</sup> In this case, which was tried in London before Lord Ellenborough and a special jury, Lord Ellenborough was at first inclined to think the contract absolute unless the broker's authority was limited by a writing of which the purchaser had notice. The gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill the seller is always understood to reserve to himself the

power of disapproving of the sufficiency of the purchaser and annulling the contract. Lord Ellenborough allowed that this usage was reasonable and valid. But he clearly thought that the rejection must be intimated as soon as the seller has had time to enquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigency of commerce would permit. So thought the jury, and found for the plaintiff.

complete a new *consensus* forming a good contract (and one valid within the Statute of Frauds) if there was not a valid contract already (*Goom v. Aflalo*, 6 B. & C. 117), and a *novation* of the contract if there was (*Thornton v. Charles*, 9 M. & W. 802; *Thornton v. Meux*, M. & M. 44; *Sieveuright v. Archibald*, *per* Patteson, J., 17 Q. B. 116).

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If the bought and sold notes materially disagree they nullify each other (*Thornton v. Kempster*, 5 Taunt. 786; *Sieveuright v. Archibald*, 17 Q. B. 102). In such a case it has been said there is no contract.<sup>1</sup> If indeed the bought and sold notes differ, there are great difficulties in the way of *proving* a contract. Yet the general tenor of the judgments in *Sieveuright v. Archibald* (17 Q. B. 102), and particularly of Erle, J., and Patteson, J., appears to bear out the view that parol evidence of the contract would have been admissible if the Statute of Frauds had been otherwise satisfied. The opinion of Erle, J., contains an exhaustive analysis of the cases bearing on the point, and a powerful argument to the effect that the disagreement of the bought and sold notes is not inconsistent with the existence of a contract. And there is nothing in the other judgments delivered in this case to detract from the weight of this argument, although the judgment of Lord Campbell, C.J. (concurring in by Wightman, J.), states that the evidence in the particular case pointed to an intention that the notes should constitute the contract, and that it would be difficult in the face of this to set up a parol contract. It is at least certain that a contract made by correspondence is none the less binding because there is afterwards an exchange between the brokers of bought and sold notes in terms not warranted by the authority of the buyer (*Heyworth v. Knight*, 17 C. B. (N. S.) 298). And even a special custom to contract by bought and sold notes, of which there appears to have been some evidence in *Cowie v. Remfry* (5 Moo. P. C. 232), can

Variance  
between them  
and its effect.

<sup>1</sup> *Per* Gibbs, C.J., in *Cumming v. Roebuck*, Holt N. P. C. 172; *per* Lord Abinger, C.B., in *Thornton v. Charles*, 9 M. & W. 805, 809; *per* Lord Denman, C.J., in *Gregson v. Ruch*, 4 Q. B. 737; *per eundem* at *nisi prius*, *Townend v. Drakeford*, 1 Car. & K. 20. By the judgment in *Freeman v. Loder*, delivered by Lord Denman, it is also implied that the notes were the contract.

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hardly derogate from the effect of what would otherwise be a good mercantile written contract (see remarks of Willes, J., on *Cowie v. Remfry* in *Heyworth v. Knight*, 17 C. B. N. S. 298 and 310, and note pp. 310, 311, from which it appears that the dissentient judge in *Cowie v. Remfry* was Pemberton Leigh). The main point decided in *Sievwright v. Archibald*, and in which the judgment of Erle, J., was overruled by the majority of the Court, consisting of Campbell, C.J., Patteson and Wightman, JJ., was this, that where the bought and sold notes or either of them are relied on to satisfy the Statute of Frauds a material variance between them is fatal. Until a variance is shown it is presumed that the bought and sold notes correspond so that the production of one of them containing all the terms of the contract is *prima facie* sufficient to satisfy the Statute of Frauds; the presumption then being that the other note was duly delivered and that it corresponded with the one produced (*Hawes v. Forster*, 1 Mood. & Rob. 368, 371; *Parton v. Croft*, 16 C. B. N. S. 11). It may be inferred from the decision in *Sievwright v. Archibald*, that if the non-delivery of one of the notes were proved, the statute would not be satisfied, unless the delivery had been dispensed with by the party to whom it should have been delivered as in *Humphries v. Carvalho* (16 East, 45; Blackburn on Sale, p. 101).

An apparent variance may be sometimes explained by evidence of mercantile usage showing the meaning of the terms to be such as to render the difference of language immaterial (*Bold v. Rayner*, 1 M. & W. 343). This must of course be within the limits of the general principles which admit evidence of mercantile usage in the construction of documents. Parol evidence has also been admitted to explain an apparent variance by showing that certain terms as to deposit and discount contained at the foot of the bought and sold notes were not employed to express terms of the contract between seller and buyer, but as memoranda of certain terms of the broker's employment as between him and his principals respectively (*Kempson v. Boyle*, 3 H. & C. 765). And where the broker had delivered bought and sold notes but that delivered to the defendant was unsigned, and the defendant

kept it three weeks and then objected *not that he did not make the contract but that the note was unsigned*, this was held evidence against him of the contract and of his employment of the broker, and the note delivered to the plaintiff having been in identical terms and signed by the broker, was held sufficient to *bind the defendant* by the statute (*Thomson v. Gardiner*, 1 C. P. D. 777).

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On the view taken in the preceding pages of the true function of the documents issued by the broker, little importance can be attached to the formal entry in the broker's book.<sup>1</sup> At one time it was held that the entry was *the contract* (*Heyman v. Neale*, 1809, 2 Camp. 337; *Henderson v. Barnwell*, 1 Y. & J. 387); but this opinion was gradually altered and finally abandoned under experience of the views entertained by merchants (*Hodgson v. Davies*, 2 Camp. 531; *Goom v. Aflalo*, 1826, 6 B. & C. 117; *Thornton v. Meux*, 1826, M. & M. 44, where Abbott, C.J., retracted an opinion previously expressed by him in *Grant v. Fletcher*, 5 B. & C. 436; *Hawes v. Forster*, 1834, 1 Mood. & Rob. 368). It must be admitted that the old opinion is apparently adhered to by strong dicta in the judgment of Campbell, C.J. (concurring in by Wightman, J.), delivered in the case of *Sievwright v. Archibald* (17 Q. B. 124); and a similar opinion is maintained by Mr. Benjamin in his book on Sale (2nd ed., p. 221). In marshalling his authorities for it I think Mr. Benjamin erroneously claims that of Patteson, J., in his judgment pronounced in *Sievwright v.*

Entry in broker's  
book not the  
contract.

<sup>1</sup> To understand the effect of the cases upon this point it must be mentioned that by certain statutes and regulations now virtually repealed by the "London Brokers' Relief Act, 1870," it was laid down that every broker in London "shall keep a book or register, intituled 'the Broker's Book,' and therein truly and fairly enter all such contracts, bargains, and agreements on the day of making thereof, together with the christian and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought and the price of the same, and the

terms of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively containing therein a true copy of such entry: And shall, upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements." Blackburn on Sale, pp. 85, 86.

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*Archibald*; and I think he omits to give due weight to the mercantile evidence given in the 2nd trial of *Hawes v. Forster*, which was held for the express purpose of ascertaining the usage. Now although it may be inferred from the judgment of Patteson, J., in *Sievwright v. Archibald* (17 Q. B. 116), that the Court were by no means prepared to accept the verdict in *Hawes v. Forster* as settling in point of law that the bought and sold notes were the contract, the evidence (being all one way) and the verdict must be taken as conclusive in point of fact that there was no mercantile usage that the entry in the broker's book constituted the contract. Now the only argument brought forward to control this negative weight of mercantile custom was the then subsisting regulation (by statutory authority) concerning the broker's book and the duty of the broker to enter the contract in it. The statutory force of that regulation having been abrogated, there is now neither statute nor custom, as there certainly appears no presumption from the nature of the thing, to warrant the assertion that the entry in the broker's book is the contract.

Is it evidence of the contract.

Whether or not the entry in the broker's book is evidence of the contract is a much more difficult question. In *Thornton v. Meux* (1827), at *nisi prius*, Abbott, C.J., refused to receive the broker's book as evidence. In this he appears to have been influenced by the view that the bought and sold notes are the contract, and doubtless also by the inconvenience, which on a collateral question was pointed out by him in *Goom v. Aisla*, 6 B. & C. 117, of making the contract depend upon some private act of which neither of the parties to it would be informed. In a later case, *Thornton v. Charles* (1842), 9 M. & W. 802, 807, 808, Parke, B., said, "I apprehend it has never been decided that the note entered by the broker in his book and signed by him would not be good evidence of the contract so as to satisfy the Statute of Frauds there being no other . . . or . . . that if the bought and sold notes disagree and there be a memorandum in the book made according to the intentions of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds." Lord Abinger, however, who had in the course of the argument thrown out an opposite view said, "I adhere to the opinion given by

me that when the bought and sold notes differ materially from each other, there is no contract unless it can be shown that the broker's book was known to the parties," adverting doubtless to the same inconvenience as that pointed out by Abbott, C.J., in *Goom v. Aflalo* (6 B. & C. 117). The view favoured by Mr. Blackburn (on Sale, p. 114), is that this consideration of the inconvenience of making the terms of the contract depend on a private act of the broker's ought to turn the scale, but he thinks the point must remain doubtful until there is a decision of a Court of Error upon it. That is to say he thinks it would require the decision of a Court of Error to outweigh the dicta of Parke, B., above cited. It is to be observed that since the publication of Blackburn on Sale, one ground of the refusal in *Thornton v. Meux* to admit the broker's book as evidence, namely the notion that the bought and sold notes *are the contract*, has been cut away by the judgments in *Sievwright v. Archibald*.

In the Irish case of *Richey v. Garvey* (1847), 10 Ir. Law Rep. 544, a note made by the broker two days after the contract and not sent to either party, was admitted to satisfy the Statute of Frauds; there being, apparently, satisfactory parol evidence of the contract.

In the apparent conflict of authority upon the question, I submit the following solution. The entry can only be evidence *between the parties*, if the broker had authority to make and sign it from the party to be charged (*Pitts v. Beckett*, 13 M. & W. 763). Of that authority there can hardly be any direct evidence. It can only be presumed from the fact *that he had authority to make and did make the contract*. To use the entry *as evidence of the contract* would be reasoning in a circle, and where propounded as the only evidence, or as evidence to decide in case of variance between the bought and sold notes, common sense counsels its rejection. But, if the terms of the contract are proved *aliunde*, whether by parol evidence or otherwise, and agree with the entry made and signed by the broker, there is then a *constat* as to his authority to make and sign it. For the broker being employed to make the contract, would be authorised to do what is necessary to make it binding, according to the principle above stated, p. 221, *ante*. The entry *so corroborated may then be fairly admitted to satisfy the*

*Semble that it is practically useless as evidence.*

*But the contract being proved aliunde, may satisfy the Statute of Frauds.*

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*Statute of Frauds* (*Richey v. Garvey*, 10 Ir. L. Rep. 544; *Thomson v. Gardiner*, 1 C. P. D. 777). This reasoning will apply equally to such a jotting as mentioned above (p. 428, *supra*), as to any more formal entry such as was formerly required by the regulations in the case of brokers in the City of London. The solution of the question here proposed appears hardly inconsistent with the *dicta* of Baron Parke in *Thornton v. Charles*; it is consistent with the admission of the broker's note in the Irish case of *Richey v. Garvey*; and it justifies the rejection of the broker's book as evidence by C.J. Abbott, in *Thornton v. Meux*.

Broker's commission, how earned.

In regard to the earning of his commission by the broker, the criterion is, generally speaking, the making of a contract. And, as a general rule, the commission is earned by the broker by whose intervention the parties are brought together in the matter which results in a contract, although he is not actually employed at the time the bargain is struck (*Wilkinson v. Martin*, 8 C. & P. 1, 5; *Burnet v. Bouch*, 9 C. & P. 620; Russell on Agency, p. 130 *et seq.* And, as to house agents, *Marshall v. Clements*, L. R. 9 C. P. 139).

*Insurance Brokers.*

Insurance brokers are common agents to effect policies of marine insurance.

According to the practice in this country, marine insurance is usually effected through the agency of insurance brokers, who are common agents between the underwriters and the insured. As agent for the insured, the broker effects the policy; and as agent for the underwriters he receives the premium, and delivers and sometimes subscribes the policy. He has a right of retention or lien upon the policy for the premium which he has paid or is liable to pay for it (*Fisher v. Smith*, 4 App. Ca. 1).

Their general authority on behalf of the underwriter.

In regard to his authority as agent for the underwriter it has been held that to prove authority of the agent to subscribe a policy or sign a memorandum of alteration upon it, *prima facie* evidence is afforded by showing that the underwriter had before paid losses in accordance with instruments similarly subscribed or signed (*Haughton v. Ewbank*, 4 Camp. 88; *Brocklebank v. Sugrue*, 5 Carr. & P. 21). It has been also ruled by Lord Ellenborough that where a broker has authority to subscribe a



policy he has authority to adjust the loss on it (*Richardson v. Anderson*, 1 Camp. 43, note *a*). It has been decided that he has, in the absence of a proved usage, no general authority to pay a loss (*Bell v. Auldjo*, 4 Dougl. 48). But where the broker has been in the habit of settling losses for the underwriter, which the latter has afterwards paid; this would probably be evidence of such an authority; and it has been held to be sufficient evidence of an authority on behalf of the underwriter to refer a dispute concerning such loss to arbitration (*Goodwin v. Brooke*, 4 Camp. 163).

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In regard to his authority on behalf of the insured, the broker has, by the established usage, general authority to effect a policy in his own name on behalf of his principal, and he can of course sue in his own name upon the policy so effected (*Russell on Agency*, 2nd ed., p. 53; *Provincial Insurance Co. of Canada v. Leduc*, L. R. 6 P. C. 221, 224; *Lloyds' v. Harper*, 16 Ch. D. 290, 321). This does not prevent the application of the ordinary rule already adverted to in regard to agents generally and particularly brokers for sale (p. 430, *ante*; *Calder v. Dobell*, L. R. 6 C. P. 486), that the principal, hitherto undisclosed, may sue on the contract made in the agent's name, subject to any defences or equities which without notice may exist against the agent (*Browning v. Provincial Insurance Co. of Canada*, L. R. 5 P. C. Ap. 263). It is the duty of the broker to state all material facts and the latest intelligence concerning the ship insured, and the principal is responsible for his doing this, so that the policy is avoided if a material fact is concealed by the broker, although the latter may have thought it immaterial (*Shirley v. Wilkinson*, 1 Dougl. 306 note). It is also within the broker's general authority, the policy being left or placed in his hands, on behalf of the insured, to adjust and receive payment *in money* of any return of premium or any loss on a policy which he has effected (*Shee v. Clarkson*, 12 East, 507, 511; *Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bangley*, 4 B. & Ald. 395, 399; *Sweeting v. Pearce*, 7 C. B. N. S. 449, 480; *Russell on Agency*, p. 57). In a number of cases, evidence has been given of a usage at Lloyds' for the broker and underwriter between whom there are running accounts, to settle a loss by setting off premiums due on other policies made by the same

Their general authority on behalf of the insured.

Usage to set off credits between underwriter and broker.

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Disregarded in  
all the earlier  
cases.

In *Stewart v. Aberdeen* usage upheld on presumption of its being known to insured.

broker with the underwriter, so that the amount set-off is considered and treated as a payment. In all the earlier cases it was held that such a usage was not binding on the assured. In *Todd v. Reid* (4 B. & Ald. 210), it was broadly laid down by the Court of King's Bench, that no usage could sanction such a practice. In *Russell v. Bangley* (4 B. & Ald. 395), a similar usage is set up, but the Court did not regard the facts as consistent with the view that the underwriter was released, particularly as his name was not struck off the policy. In *Bartlett v. Pentland*, in 1830 (10 B. & C. 760), evidence was given of the usage, which I here quote, as being at least clear and intelligible. The usage, as here stated, is "That when a policy is adjusted payment is made at the expiration of a month, at which time the broker's account is credited with the amount of the loss, and if the premiums due fell short of such amount the balance is paid to the broker in cash. If at the time of adjustment, the amount of premiums due from the broker to the underwriter exceeds the amount of the loss, it is usual for the underwriter to strike his name off the policy at that time, but the broker is not credited till the end of the month, it being considered that during the interval the assured may call for the money from the underwriter." In this case the insurer resided at Plymouth, and it was proved that he was not in fact acquainted with the usage. It was decided, in effect, that the underwriter was not released unless there was something to show that the insured had assented to his release; or at least that he was cognizant of the alleged usage. In the case of *Scott v. Irving*, six years later (1 B. & Ad. 609), where the insured resided in Glasgow, the decision was to a similar effect. At length in *Stewart v. Aberdeen* (4 M. & W. 211, 228), where a set-off was pleaded in accordance with the above-mentioned usage, of which evidence was again given, and it also appeared that the plaintiff had for several years employed the brokers as his agents in London for effecting insurances, and it was stated that the custom was generally known in Liverpool, where the plaintiff carried on his business; it was held that there was sufficient evidence of a custom between the brokers and underwriters to make settlements in account by taking credits as payments and also of the knowledge of the plaintiff of such a custom.

f his authority to the brokers to settle with the underwriters. The set-off claimed was allowed accordingly. But in *Sweeting v. Pearce* (7 C. B. N. S. 449, 9 C. B. N. S. 534), where it was admitted that the plaintiff (who was a shipowner in London) did not in fact know of the usage in question, though it was found by the jury that the usage was generally known to merchants and shipowners:—it was held by the Court of Common Pleas, and on appeal by the Exchequer Chamber, that the plaintiff could not be bound by the usage. Several of the judges in the Exchequer Chamber express the opinion that the usage proved is unreasonable; and assume that the decision in *Stewart v. Aberdeen* was based on the view that the plaintiff not only knew of the usage but assented to the settlement of accounts on that footing. It is, moreover, observed by Cockburn, C.J., that the evidence of the plaintiff's knowledge in *Stewart v. Aberdeen* was unsatisfactory.

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In *Sweeting v. Pearce* (1859) again held that the usage, not being in fact known to assured, could not bind him.

Decision in *Stewart v. Aberdeen* unsatisfactory.

It was formerly necessary, under 25 Geo. III. c. 44, for a person residing in Great Britain who made or caused to be made a policy of insurance upon his interest in any ship or goods to insert in the policy, either his own name as the person interested, or the name of the person who effected the policy, *as the agent of the person interested*. But the statute 28 Geo. III. c. 56 repealed this and enacted instead to the effect that it should not be lawful for any person to make or cause to be made a policy on ship or goods without inserting in the policy the name or usual style and firm of one or more of the persons interested; or instead thereof, the name or style and firm of the consignor or consignee; or of the person residing in Great Britain who shall receive the order for and effect such policy of assurance, or of the person who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy. Under the last-mentioned statute the broker who effects the policy need not describe himself as agent (*Bell v. Gilson*, 1 B. & P. 345, and *de Vignier v. Swainson*, cited in note to same case at p. 346; Russell on Agency, p. 53).

Statutory requirement as to insertion of name of person interested or agent.

It is a well understood practice between insurance brokers and underwriters in London for the latter to give the broker, besides

Usage to allow broker 12 per cent. on profits

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besides the 5 per  
cent. commission.

his commission of £5 per cent., a gratuity or allowance of 12 per cent. on the profits ascertained at the end of the year; and the broker has been held entitled to retain this allowance, without accounting for it to his principal, although not stated in the accounts, and alleged by the latter to be received without his knowledge (*Great Western Insurance Co. v. Cunliffe*, L.R. 9 Ch. 525).

#### *Stock-brokers.*

I shall consider stock-brokers (or more properly speaking stock and *share* brokers), particularly in relation to the usages of the London Stock Exchange. If the length at which I discuss this subject appears disproportionate, this is owing to the peculiar nature of the usages themselves, and the minuteness with which they have been investigated in the cases before the Courts.

Broker on  
London Stock  
Exchange has  
authority to  
contract accord-  
ing to the usages  
of the Exchange.

According to the general principle already laid down (p. 426, *ante*), when a stranger gives an order to a broker who is a member of the London Stock Exchange to buy or sell shares he gives him authority to make a contract on the footing of the usages of that market, provided such usages are *fair*—that is to say not calculated for the benefit of members at the expense of the outside public—and provided they do not alter the essential character of the contract purporting to be made by the broker on behalf of his principal. The most important and difficult cases which have been discussed in the Courts in regard to these usages are those which relate to the liability on shares in companies sold on the Stock Exchange.

Liability on  
shares sold on  
the Stock  
Exchange.

In a contract for the sale of property involving liabilities, it is generally presumed to be the intention that the buyer, while taking all the advantages of ownership, is to accept the liabilities and relieve and indemnify the seller therefrom. The sale of *shares* in undertakings and companies involving liability is, as I shall presently show, no exception to this; but the question who is the person to be fixed with the liability on shares sold in the usual manner on the Stock Exchange has undergone much consideration.

The immediate buyer from the broker is most commonly another member of the Stock Exchange, who, dealing on his own account for the profit on the turn of the market is called a *jobber* as distinguished from a *broker*. The contract between these two is of course made on the footing of the usage of the Stock Exchange, and will be binding between them according to such usage; it being the basis of all dealings on the Stock Exchange that members are responsible to each other as principals on the contracts made by them whether on their own account or on account of others.

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Members of the  
Stock Exchange  
contract with  
each other as  
principals.  
Jobbers and  
Brokers.

The express contract, which is usually made verbally between the broker and the jobber, is simply to sell so many shares of a certain description at a certain price. It may be expressed, but if not expressed would be understood that the sale is "for the account," meaning for settlement at a certain date which is well known to members, there being two fixed dates in each month known as settling-days. The seller is informed of the contract by a memorandum or contract note furnished to him by the broker, and stating that the broker has sold for him "for the account," or "for settlement," (specifying the date of the settling-day) a certain number of shares of the specified description at so much per share, stating the total amount of purchase-money and deducting the commission.

Nature of their  
contract.

According to the usage of the Stock Exchange as interpreted by the decisions, the meaning of the contract, from the point of view of the jobber, has been stated to be as follows:—"I (the jobber) agree with you (the seller) that on the settling-day I will either myself take and pay for the shares, or I will, on the previous day<sup>1</sup> furnish you with the name of another person who will agree with you to take a transfer of the shares, and will pay for them, and if you desire to enquire into the responsibility of that person you shall have a limited number of days to do so" (*Nicholls v. Merry*, L. R. 7 H. L. 530, *per* Lord Chancellor (Cairns), 541; *cf.* *Grissell v. Bristowe*, L. R. 4 C. P. 46, and *Maxted v. Paine*, 2nd action, L. R. 6 Ex. 132).

According to the  
usage.

In order to simplify the description of the usage I shall take a simple case, and suppose the jobber who buys the shares in

<sup>1</sup> The day fixed for giving the "name day," and is the day before the name is called the "ticket day" or the "settling" or "account" day.

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the first instance from the seller's broker to sell them in one lot to another broker acting for a buyer. On the ticket day, the buyer's broker, in token of his "taking up" the shares, hands to the jobber a ticket containing the name of the buyer and the number of shares bought, and the jobber passes this ticket to the seller's broker, who thereupon makes out a transfer of the shares to the buyer named on the ticket. Having procured the execution by his principal of the transfer, the usual course is for the seller's broker to hand over the transfer to the broker of the buyer named on the ticket on receiving from him the price expressed in the transfer, any difference in price being settled between the jobber and the broker (*Grissell v. Bristowe*, L. R. 4 C. P. p. 51).

Having thus for simplicity described a case where the shares sold are bought in a single and entire lot and comprised in a single ticket, I proceed to the more complex (and commoner) cases. As purchases of shares by persons intending to hold them are commonly made quite irrespective of the sales by shareholders, it is not to be expected that a ticket issued by a buyer should exactly correspond to the lot sold to the jobber. In order to facilitate dealings it is, by the usage, competent to the jobber (who I still suppose to be the immediate purchaser from the seller's broker) to split up the lot so bought by him into parcels, according to the tickets which may happen to have been passed to him, and to appropriate to each parcel the name on the corresponding ticket. This he does by passing the several tickets to the seller's broker, and the parcel represented by each ticket passed by him is then separately dealt with, in the manner above described.

Further, instead of being passed from the broker of the buyer through the hands of a single jobber to the broker of the seller, the ticket may pass through the hands of several members of the Stock Exchange, and may be "split" by any holder (which is done by keeping in his possession the original ticket and passing copies of it filled in respectively with smaller amounts making up in the aggregate the number of shares in the original ticket) with the result that the member who last receives the ticket or "split" settles the transaction with the member who issued the ticket, in the manner above stated.

A broker who sells shares for his employer for the settling-day will, in the ordinary course of business above described, receive, on the ticket day, a ticket or tickets corresponding to the shares sold; and he has the intervening period until the last day of transfer (10 days later) to get the transfers executed by his employer, and (if desired) to make enquiries as to the names on the tickets. But there is nothing to prevent tickets being passed on from one member of the Stock Exchange to another, after the ticket day and up to the last day allowed for transfer. In every case the ultimate holder of the ticket is liable according to the rules of the Stock Exchange, to deliver transfers according to the ticket, and entitled upon due delivery, to receive payment from the issuer of the price mentioned in the ticket: and upon settlement of these obligations between the persons so ultimately liable, or upon the relation being duly constituted between them and the lapse of a certain period without any reclamation being made, all the intermediate contractors, being members of the Stock Exchange, are discharged.

The Courts have in effect held that what is thus imported by usage into contracts made on the Stock Exchange is not unfair to the outsider, nor such as to change the essential character of the contracts. They have decided that when the jobber who is buyer in the first instance, has passed to the seller's broker a ticket giving the name as buyer of a person who has agreed to take the shares, or a parcel of them, and the buyer's broker has in due course paid for the shares and taken from the seller's broker the share certificates and transfers executed by the seller in favour of the person whose name is on the ticket as buyer, then the jobber (having settled all differences of purchase-money according to his original contract) is discharged so far as relates to the parcel of shares so dealt with (*Grissell v Bristowe*, L. R. 4 C. P. 36; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Maxted v. Paine*, 2nd action, L. R. 4 Ex. 203, 6 Ex. 132). But, if the name given by the jobber is that of a person who has not agreed to take a transfer (*Maxted v. Paine*, 1st action, L. R. 4 Ex. 81), or of an infant, who has no capacity to contract (*Merry v. Nichalls*, L. R. 7 Ch. 733; *Nichalls v. Merry*, L. R. 7 H. L. 530), then he is not discharged, but is liable as if he

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had agreed to take the shares absolutely. It was also decided on the appeal in *Sheppard v. Murphy* (2 Ir. Rep. Eq. 500) that a settlement made according to the usage above mentioned between the ultimate holder of the ticket (who was himself the seller) and the issuer of the ticket (being the broker who had by the instructions of the person named in the ticket bought the shares in respect of which the ticket was issued), created a privity between the seller and the employer of the broker as purchaser; so that the latter was bound to indemnify and relieve the former.

The decisions  
taken in order  
of time.

Having thus sketched the salient points of the decisions based on the usage of the Stock Exchange, I must, in order fully to explain the *ratio decidendi* as well as to show more completely the effect of the decisions, give some details of the cases in their order of date.

*Sutton v.  
Tatham.*

In *Sutton v. Tatham* (1839, 10 Ad. & El. 27) the general rule was laid down that a person employing a broker on the Stock Exchange must be taken to authorise his acting in obedience to the rules of the Stock Exchange. The circumstances were that the defendant having only fifty shares, by mistake ordered the broker (the plaintiff) to sell 250, and, default having been made in delivery of shares the purchaser's broker bought in shares and charged the plaintiff with the differences and commission which the latter paid in accordance with the rules of the Stock Exchange. The plaintiff was held entitled to recover these payments from the defendant his employer.

*Wynne v. Price.*

In *Wynne v. Price* (1849, 3 De G. & S. 310) by decision of Vice-Chancellor Knight Bruce, a privity was established between the plaintiff who was the seller of shares in a railway company, and the defendant who was the broker of the ultimate purchaser, and who (his principal not being ready) had agreed with the jobber to take the shares, and had received from the seller's broker a transfer to himself executed by the seller, and paid to the seller's broker the agreed-on price of the shares: and the defendant was ordered to execute the transfer and deliver it to the secretary of the company for registration, to pay the calls made since the sale and to indemnify the seller against future calls.



*Shaw v. Fisher* (1855, 5 D. M. & G. 596) is a decision of Lord Cranworth's, which, though not based on Stock Exchange usage, may be here appropriately mentioned. Shaw sold certain railway shares to *Fisher*, who sold them again to one Caermichael. Shaw executed a transfer to Caermichael, who afterwards absconded. *Shaw* filed a bill for specific performance against *Fisher*, and a decree was made; but ultimately, after an enquiry into the title, the defendant succeeded on the ground that *Shaw* having executed a transfer in favour of *Caermichael*, who might at any time come in and register it, could not make a title to the shares so as to carry out the contract with *Fisher* on which the bill was founded.

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*Shaw v. Fisher.*

In *Taylor v. Stray* (1857, 2 C. B. N. S. 175), a case arising out of the failure of the Royal British Bank, the plaintiff was a broker on the Stock Exchange who had in accordance with the rules of the Stock Exchange paid the purchase-money of shares which his principal (the defendant) declined to take or pay for, and he brought the action to recover the money so paid. The stoppage (which resulted in bankruptcy) of the bank occurred between the date of the sale of shares and the day fixed for settlement. It was proved that the Bank refused to prepare a transfer, and there was some evidence that they, as a general rule, declined to recognise transfers after the failure, and this was insisted on in argument as a ground why the plaintiff could not have been compelled to pay. The seller had however tendered transfers duly executed, and it was shown to be the rule of the Stock Exchange that on such tender the member of the Stock Exchange making the contract for the purchaser is bound to pay. The Court, consisting of Cresswell, J., Crowder, J., and Willes, J., held that the plaintiff was entitled to recover. Cresswell, J., in his judgment, observed that the only question of difficulty was whether the seller could be said to have tendered the things he contracted to sell. This question he, as well as Mr. Justice Crowder, decided in the affirmative. Willes, J., based his judgment on the ground that whatever might be the rights as between buyer and seller, the broker having been compelled to pay according to the course of business of the market, was entitled to recover from his principal the money so paid.

*Taylor v. Stray.*

This judgment was affirmed in the Court of Error (before

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Lord Campbell, Lord C. Baron Pollock, Coleridge, J., Erle, J., Crompton, J., and Bramwell, B.), without hearing counsel for the respondents.

*Stray v. Russell.* Subsequently, and in regard to the same transaction, the purchaser *Stray* brought an action against the seller *Russell* for a return of the purchase-money, and, it was decided both in the Queen's Bench and, on error, in the Exchequer Chamber, that he could not recover (*Stray v. Russell*, 1 E. & E. 880, 916, Ex. Ch.) The contract, says Lord Campbell (1 E. & E. 901), as interpreted by the usage of the Stock Exchange, is to sell and deliver genuine transfers and certificates, with the interests and rights which they convey. In the judgment of the Court of Error it is said,—“construing the contract by the usage of the Stock Exchange, subject to which it was made, there was no undertaking by the vendor of the shares to obtain, absolutely, the consent of the directors to the transfer.” The plaintiff's case was also held to fail because, as he in the first instance declined to take the shares, it was not shown that the failure to carry out the transaction was owing to the action of the directors. In the report of this case (1 E. & E. 901) we find also a reference to an important observation of C. Baron Pollock in the Court of Error in *Taylor v. Stray*, that what the purchaser was to get was not an assured transfer into his own name but the *jus disponendi*.

*Ex parte Walton*  
*Ex parte Hue.* In two applications (*Ex parte Walton* and *Ex parte Hue*, 3 Jur. N. S. 353) made before V.-C. Kindersley, arising also out of the failure of the Royal British Bank, he refused to strike off the name of the vendor from the list of contributories, but this decision was given expressly without prejudice to any right of indemnity which the vendors might have against their vendees. The same judge gave a similar decision in regard to shares in Overend, Gurney & Co. in *Walker's case*, L. R. 2 Eq. 554.

*Birmingham v. Sheridan.* *Birmingham v. Sheridan* (1864, 33 Beav. 660) is a case which though not arising out of a contract made on the Stock Exchange, has been so frequently referred to in the cases now under discussion, as to require some comment. The plaintiff being the registered owner of 1,000 £5 shares in a life assurance company, on which 5s. only had been paid, verbally agreed to

sell them to the defendant for £250, and the defendant agreed to purchase them on those terms. The purchase-money was paid, but before any legal transfer had been executed the company was ordered to be wound up. A transfer of the shares was subsequently executed by both parties, but the official liquidator refused to register or recognise it, and the plaintiff was thereupon put on the list of contributories and made liable for calls. The plaintiff's suit was in effect to claim indemnity from the defendant. The Master of the Rolls (Romilly) construed the contract as a contract conditional on the company accepting the defendant as a shareholder in accordance with its rules; he attached great importance to certain of the articles of association which made a change of membership subject to the approval of the directors; and he decided that, the official liquidator representing the company having declined to register the defendant, the contract could not be carried out, and the suit failed.

Having, as part of the history of my subject, stated the case of *Birmingham v. Sheridan*, I must add that I do not think the decision can be safely relied on as an authority. The articles of association as to the approval of the directors to a transfer were very similar to the deed of constitution of the Royal British Bank (1 E. & E. 896; 3 Jur. N. S. 353), and that point was fully argued in *Stray v. Russell*. The only difference was that in the one case the contract was made on the Stock Exchange and in the other it was not. The construction of the contract adopted by Lord Romilly is at least a solecism. It is true that in *Wilkinson v. Lloyd*, 1845, 7 Q. B. 27, the Court held that the vendor was by his contract bound to obtain the consent of the directors, and having failed to do so could not resist an action for repayment of the purchase-money. But the directors' refusal, in that case, was in consequence of disputes between the vendor and the company, so that there was a real defect in the vendor's title. At all events the decision in *Birmingham v. Sheridan* does not apply to the case of a contract for the sale of shares made on the Stock Exchange. In such contracts it is clear by the decision of the Queen's Bench, affirmed by a Court of error, in *Stray v. Russell*, that the intervention of a stoppage and bankruptcy of the company preventing a com-

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pletion of the transfer, is at law no bar to a claim for the purchase-money; and by the decision of the Court of Appeal in Ireland, affirming on this point the decision of the Vice-Chancellor, in *Sheppard v. Murphy* (a decision since adopted as authoritative in England, *Grissell v. Bristowe*, L. R. 4 C.P. 51), it is equally clear that the intervention of a winding up and consequent non-completion of the transfer by registration, is no bar in equity to the enforcement of specific performance of the contract, so far as relates to the seller's right to relief and indemnity from the buyer. There was another point decided in *Birmingham v. Sheridan*, namely that the Court would not compel the company to register the transfer. On this point the decision has been unquestioned. It is in accordance with the decision of V.-C. Kindersley in *Walton's* and *Hue's cases*, and is confirmed by the decision of the same authority in *Walker's case* above mentioned.

*Emmerson's case.*

In *Emmerson's case*, 1866, L. R. 1 Ch. 433, it was decided by the Lords Justices Turner and Knight Bruce, reversing the decision of the Master of the Rolls, that an agreement for the sale of the shares in a company, entered into after a petition had been presented for winding up the company (on which an order for winding up was made), but before the petition was advertised, and both parties having been in ignorance of the fact that the petition had been presented; could not in equity be enforced against the purchaser: and on this ground they refused an application to put the buyer's name on the list of contributories. The Court considered, in effect, that the contract was grounded on essential error in the subject matter (see p. 142, *ante*); both parties conceiving they were dealing in shares of a going company, and the property so dealt in having been, unknown to the parties, destroyed before the contract. It is not expressly stated in the report of *Emmerson's case* whether or not the shares were bought on the Stock Exchange, but it may be inferred from some expressions of the report that they were. It does not however appear that the Court would have considered that material.

*Paine v.  
Hutchinson.*

*Paine v. Hutchinson* (Dec. 5, 1866, L. R. 3 Eq. 257; 3 Ch. 388), was an action for specific performance and indemnity arising out of a purchase of shares in the Contract Corporation.

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The action was brought by the jobber against the ultimate purchaser, in whose favour a transfer had been executed by the original seller (*Cruse*). The defendant denied having given any authority to his broker to give his name as the transferee, but it not appearing that he had furnished any other name, the Vice-Chancellor Sir John Stuart did not accept this denial, and decreed specific performance. It was, indeed, suggested in argument, that the defendant's contract was not with *Paine* but with *Cruse*. But no evidence was given of usage on the Stock Exchange to show that *Paine* had been eliminated from the transaction; and indeed he was not, for his contract with *Cruse* was a special one, on which (as subsequently decided in *Cruse v. Paine*, L. R. 6 Eq. 641; 4 Ch. 441) he remained liable. On appeal (L. R. 3 Ch. 388) Sir J. Stuart's decree was affirmed by the Lords Justices (Page Wood and Selwyn) with the addition of inserting provisions for indemnity following so far as applicable (the plaintiff's name not being actually on the register) the form of decree in *Evans v. Wood* (see *post*, p. 453).

In *Chapman v. Shepherd* and *Whitehead v. Izod* (1867, L. R. 2 C. P. 228), cases arising out of the failure of *Overend, Gurney & Co.*, a contract for the purchase of shares had been made on the Stock Exchange but not completed by transfer before the presentation of a petition for winding up; and the broker who had been compelled to pay for the shares according to the usage of the Stock Exchange, was held (as in *Taylor v. Stray*), entitled to recover back his money from his employer. It was argued, but unsuccessfully, that the 153rd section of the Companies Act made the transfer void and so put an end to the transaction. It was also held in *Biederman v. Stone*, L. R. 2 C. P. 504, that section 131 of the Companies Act 1862, which provides that all transfers of shares, made after the commencement of a voluntary winding up, without the sanction of the liquidators, shall be void, did not excuse a seller (through a broker on the Stock Exchange) from executing a transfer so as to enable his broker to comply with the rules of the Stock Exchange as to delivery of the shares. In connection with these cases I may here mention *Rudge v. Bowman* (L. R. 3 Q. B. 689), a decision on demurrer in conformity with these cases.

*Chapman v.  
Shepherd.  
Whitehead v.  
Izod.*

*Biederman v.  
Stone.*

*Rudge v.  
Bowman.*

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*Hawkins v.*  
*Maltby.*

*Hawkins v. Maltby* (L. R. 4 Eq. 572, 3 Ch. 188; 6 Eq. 505, 4 Ch. 200) was a suit, or rather two suits, by the seller of shares in the Imperial Mercantile Credit Co. against the ultimate buyer, for relief and indemnity. The plaintiff through his broker, had made a contract on the Stock Exchange to sell to a jobber forty shares for £202 10s. The defendant subsequently directed his broker to buy 100 shares; and in accordance with the usage of the Stock Exchange, the name of the defendant was passed to the plaintiff's broker as the buyer of the forty shares. The plaintiff executed a transfer deed of the shares to the defendant, leaving a blank for the consideration, and handed it to his brokers, who filled up the blank with £145 (being the price which the defendant had agreed to pay) and handed the deed, together with the certificates of the shares, to the defendant's brokers, who paid the plaintiff's brokers £145, the jobber paying the difference, £57 10s. The defendant received the certificates and deed of transfer which he kept, but never executed or registered the transfer, and some time after the settlement of the purchase as above mentioned the company was ordered to be wound up. It appeared that on the day on which the defendant made his purchase a call of £5 was made on the shares, and though the point does not appear to have been taken in argument, V.-C. Wood on the hearing of the first case (July, 1867), thought that the seller could not force upon the buyer shares which the latter bought without knowing that a call was actually made and pending. But for this, he considered that the buyer by taking the transfer and certificates adopted the contract. On appeal (L. R. 3 Ch. 188) the Lord Chancellor (Chelmsford) disagreed with the Vice-Chancellor and held that the buyer must be taken to have known of the liability to the call. He, in effect, held it immaterial (in the absence of any suggestion of fraud) that the liability had become a debt. He also held that the broker was authorised to fill up the blank, and that the acceptance by the buyer's broker of the transfer and certificates, delivered in accordance with the usage, established privity between the plaintiff and the defendant. Although between seller and buyer he considered the transaction complete although the call was unpaid, and the company would not have registered a transfer without payment. But upon the re-

technical ground that the plaintiff had alleged in his bill a contract by the defendant to buy the shares in consideration of the sum of £202 10s. (which was of course wrong, the defendant's agreement having been to buy for £145), the appeal was dismissed, and the bill stood dismissed, without prejudice to another bill being filed. A fresh bill was filed accordingly, and the case heard (July, 1868,) before the Master of the Rolls (Lord Romilly), who held the plaintiff entitled to the relief asked. Ultimately the case came (25 January, 1869,) on appeal before Lord Hatherley as Lord Chancellor. He acknowledged the decision given by him as Vice-Chancellor (Wood), in regard to the effect of the call, to have been erroneous, and that the decision of Lord Chelmsford on that point was right; and he decided that, having regard to the decision which had in the mean time been pronounced in *Coles v. Bristowe* (L. R. 4 Ch. 3), everything having been done according to the usage of the Stock Exchange as expounded in that case, there could be no doubt that a privity of contract was established between the plaintiff and defendant, and that the defendant was liable to relieve and indemnify the plaintiff accordingly.

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*Hawkins v.  
Maltby*, second  
suit.

*Evans v. Wood* (Nov. 8, 1867, L. R. 5 Eq. 9), was an action arising out of the purchase of shares in Overend, Gurney & Co. on the eve of the failure. The plaintiff was the vendor, who sold through his broker on the Stock Exchange. The defendant was the ultimate purchaser, who bought through his brokers and whose name was passed by the jobber in the usual way as the purchaser of a parcel of the shares sold by the plaintiff. Transfers of the shares were executed by the plaintiff in due course and duly delivered along with the certificates to the defendant's brokers; and the transfers were actually executed by the defendant, but in consequence of his accidental absence from home there was a delay in this, and the transfers were not returned by the defendant to his brokers until after the 11th of May when the petition for winding up was presented, the company having stopped payment on the 10th. It appeared in evidence that all transfers arriving up to the morning of the 11th were registered by the liquidators, so that but for the defendant's accidental absence from home the transfers would have been registered. Lord Romilly, M.R., on this ground distinguished the case from

*Evans v. Wood*.

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*Shepherd v.  
Gillespie.*

*Birmingham v. Sheridan*, and made a decree for indemnity, the form of which was carefully settled for the purpose of relieving a vendor, who has remained on the register and become a contributory in a company which is winding up.

In *Shepherd v. Gillespie* (L. R. 5 Eq. 293, 3 Ch. 764), the plaintiff was a member of the Stock Exchange, but dealt on his own account by selling his own shares in the Joint-Stock Discount Company. The broker who bought the shares gave the name of the defendant as the purchaser, and the defendant took and retained the transfers but did not execute them, and subsequently a winding-up order was made. Vice-Chancellor Stuart pronounced a decree for indemnity, the terms of which are carefully settled, and this decree was affirmed by the Lords Justices (Page Wood, and Selwyn), who held that the defendant was precluded by his conduct from denying that he was the purchaser.

*Sheppard v.  
Murphy*, Court  
of First Instance.

The next case in order of date is *Sheppard v. Murphy* in the Irish Chancery Court, which came before the Court of First Instance on the 17th of December, 1867 (1 Ir. Rep. Eq. 490). The following were the facts :—

On the 21st of April, 1866, L. & Co. of the London Stock Exchange (brokers) bought for the defendant from Kennedy of the London Stock Exchange (a jobber) 100 shares in Overend, Gurney & Co., for the settling day the 27th April. On the 25th the shares were, by arrangement between L. & Co. and Kennedy "continued" until the next settling day, the 15th of May. Overend, Gurney & Co. stopped payment on the 10th of May. On the 24th of May the plaintiff, who was also a member of the London Stock Exchange, sold thirty-four shares to other members, and the name of M. (the defendant) was "passed" to the plaintiff as the transferee. Thereupon the plaintiff executed deeds of transfer of the shares to the defendant, handed the deeds with the share certificates to L. & Co., and was by them paid the price. The defendant refused to receive or execute the deeds of transfer. The plaintiff having been obliged to pay calls, instituted a suit against the defendant praying specific performance of their contract of sale and for relief and indemnity against the calls.

The Vice-Chancellor held it to be no objection that the suit



was brought in respect of thirty-four shares only, it being shown that by the usage contracts made on the Stock Exchange are divisible. PART VIII.  
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He also held that the arrangement to "continue" the shares, that is to say to postpone the settlement with all its incidents until the settling day on the 15th of May instead of the 27th April was within the scope of L. & Co.'s authority as brokers.<sup>1</sup>

But he held (and it was on this that his judgment was reversed on appeal as aftermentioned) that the suit could not be maintained, as *no privity* was shown between the plaintiff and defendant.

The case of *Grissell v. Bristowe* also arose out of the failure of Overend, Gurney & Co., and was decided in the first instance by the Common Pleas on the 31st of January, 1868 (L. R. 3 C. P. 112). *Grissell v.  
Bristowe.*

The pleadings in the action are important, but I shall be more in a position to explain this after stating the facts, which are stated in a special case drawn up by a referee, this course having been agreed on when the action came on for trial at *nisi prius*.

Shares in Overend, Gurney & Co. were transferable by deed executed by both transferor and transferee, and registered, such registration being subject to the consent of the directors. The company stopped payment on the 10th of May. On the 11th, a petition was presented for winding up the company, and it then became impossible to register a transfer, the liquidator refusing, and the Court having decided (in *Walker's case*, 2 Eq. 554) that they would not compel him, to do so.

<sup>1</sup> The Vice-Chancellor put this on the ground that the continuation was an arrangement common on the Stock Exchange and attended with no disadvantage to the defendant, as he was to receive the consideration. This reasoning is however not adopted by the judgment of Lord Justice Christian in the Court of Appeal. And although there is a decision of V.-C. Stuart's to a similar effect in *Crabb v. Miller* (27 January, 1871, 19 W. R. 519); it would be dangerous to place any reliance on these as authorities especially having regard to the decision of the Court of Exchequer in *Muxted v. Paine* (first action). Indeed the practice of *continuation* is hardly stated as a *usage* of the Stock Exchange: and if it were so it would be difficult to maintain it as a reasonable one to bind a stranger not knowing of and intending to assent to such a transaction. Over how many accounts would the implied authority to "continue" extend?

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On the same 11th of May, the plaintiff, who was the holder of eighty shares, instructed his brokers, Messrs. Barry & Co. of the Stock Exchange, to sell the shares, which they did the same day to the defendant a member of the Stock Exchange, who bought as a jobber, for the settling day the 15th of May.

There were other dealings for the same account between Messrs. Barry & Co. and the defendants, so that, setting off sales against purchases, there was a balance of purchases by Messrs. Barry & Co. from the defendants. In accordance with what is stated in the case to be "the practice of members of the Stock Exchange in settling their accounts with each other on the account day," Messrs. Barry & Co. did not transfer any shares to the defendants or their nominees; but, having on the account day received tickets for eighty shares from another jobber or jobbers to whom they had sold that number, they prepared transfers of the plaintiffs' shares in accordance with these tickets; sent the transfers to the plaintiffs for execution; and having received them back executed, handed them to the brokers, who issued the tickets, who received them and paid Messrs. Barry & Co. the consideration money stated on the transfers.

The *usage* of the Stock Exchange given in evidence, is stated in the special case as follows:—

"When shares are sold upon the Stock Exchange by brokers to jobbers for the account day, the usage is, that, when the account day arrives, the buyer gives to the seller the name and address of the person to whom the shares are to be transferred, who is frequently a subsequent purchaser at a different price; and in the transfer in such a case the consideration on the last purchase is stated in the transfer. If the name and address of the proposed transferee be given, the seller is bound to accept the name so given; and, when the shares are paid for, in the absence of any special bargain, the jobber is absolved from all further liability, and is not bound to see that the transfer of the shares is executed by the transferee or that it is registered, or to indemnify the seller against future calls.

"If the jobber fails so to give a name, he is bound to give his own name, and to accept a transfer of the shares. If the seller objects to the name given, he may complain to the committee of the Stock Exchange, who, if they think the buyer

has been guilty of improper conduct, may make him personally responsible."

The printed rules of the Exchange were to be referred to by either party and the Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court, as stated in the case, was whether under the circumstances then stated, the defendants ought to indemnify the plaintiff.

Before stating the judgment, I must refer briefly to the pleadings. The contract as stated in the declaration was that "in consideration that the plaintiff would sell and deliver to the defendants or such other person or persons as the defendant should name, a transfer or transfers signed by the plaintiff," the defendants promised that they the defendants or such other person or persons as they would name for the purpose, would accept the shares and cause them to be registered, or would indemnify the plaintiff from liability in respect of subsequent calls; and according to the plaintiff's case as laid in the declaration, the persons to whom the transfers were made by the plaintiffs were either the nominees of the defendants (as stated in the first count), or persons to whom (as stated in the second count) the shares were transferred at the request of the defendants, and as a substituted performance of the plaintiffs' contract to transfer to the defendants or their nominees.

The majority of the Court (Bovill, C.J., Willes and Keating, JJ.,) gave judgment in favour of the plaintiff. The judgment was to a great extent based on the ground that the practice of setting off transactions between the seller and broker and the consequent acceptance by the brokers of nominees of other jobbers was not shown to be a general usage, and that if it were it would not be binding on the plaintiff. Having regard to the mode in which the question was put in the special case they thought it should be answered independently of the pleadings, which might be amended to suit the facts, if necessary.

Mr. Justice Byles gave a contrary opinion. He attached weight to the statement in the declaration that the plaintiff *transferred the shares to the nominees of the defendants*, and held that according to the *general usage* proved in the case,

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that was sufficient to exonerate the defendants from the contract entered into by them as jobbers.

He further thought upon the statements in the case the practice of setting off between the jobber and the broker sufficiently established as a usage, and that it was not unreasonable, so that the plaintiff would be bound by it.

The judgment of the majority was reversed on appeal, and to the judgment in the appeal I shall come in its order of time. I have stated the case here at length not so much for the sake of judgment as for illustration of the question to which I shall revert hereafter,—who is liable, the jobber being exonerated. Meantime I may observe that it is difficult to see how the pleadings could have been amended in the interest of the plaintiff. The pleader had no doubt seen the dilemma which was in effect pointed out by the Court of Error (L. R. 4 C. P. 49) that either the plaintiff had transferred to the nominees of the defendants or persons having some privity with them according to the usage, or else he had transferred to strangers and rendered himself incapable of carrying out a contract of sale on his part.

*Coles v.  
Bristowe.*

*Coles v. Bristowe*, in Chancery, came to be heard in the first instance before Vice-Chancellor Malins, who gave his decision on the 2nd of May, 1868. The case was on all fours with *Grissell v. Bristowe*, except in these points:—namely, that the sale by the plaintiff's broker was made on the 9th of May, 1866, before the stoppage of Overend, Gurney & Co., that the persons to whom the transfers were made were in fact the nominees on the tickets passed by the defendants; and that the transfers were delivered to and payment received from the defendants (the jobbers), and not the brokers of the ultimate buyers. The evidence of usage, so far as relates to the facts common to both cases, was similar to that in *Grissell v. Bristowe*. The Vice-Chancellor decided in the plaintiff's favour.

*Sheppard v.  
Murphy*, on  
appeal.

The next decision in order of date is that on the appeal in *Sheppard v. Murphy*, on the 3rd of June, 1868 (2 Ir. Rep. Eq. 544). The decision was to the effect that the plaintiff was entitled to enforce the contract and obtain indemnity from the defendant: and the *ratio decidendi* as stated in the judgment of Lord Justice Christian, is of great weight and importance.

Upon the question of the authority of the broker to "continue" the shares he agreed with the Vice-Chancellor; not however thinking it necessary to lay down as a general proposition that a broker has general authority to continue a transaction over the settling day, but considering that in the particular case there was evidence of such general authority in fact. Upon the question as to the effect of the failure of Overend, Gurney & Co. and the consequent impracticability of registering a transfer, he considered on the authority of *Taylor v. Stray*, *Stray v. Russell*, *Chapman v. Shepherd*, *Biederman v. Stone*, *Paine v. Hutchinson*, and other cases, that the failure and winding up of Overend, Gurney & Co. did not prevent the defendant from becoming owner in equity of the shares and, as such, bound to indemnify his vendors. Upon the question whether the plaintiff, who (it will be remembered, see p. 454, *ante*) sold and delivered his shares on the 24th of May, had been brought into privity with the contract of 21st April (the date of the defendant's purchase), or with some legal or equitable right derived out of it, sufficient to found a suit in his own name against the defendant, he proceeds:—"Formally speaking Kennedy had two distinct contracts, originally unconnected—one with L. & Co., as brokers for the defendant for sale to them of the shares—another with Sheppard for purchase from him of shares. The transaction of the 24th May was intended by all these three parties, Kennedy, L. & Co., and Sheppard, to operate in conformity with the usage of the Stock Exchange, as a performance on all sides of both of those contracts. But if Sheppard cannot sue Murphy for want of privity he will take his remedy against Kennedy; and Kennedy will then have his remedy over against Murphy. That is precisely the circuitry which the usage of the Stock Exchange was intended to dispense with, and which it has been often held to have succeeded in dispensing with." He then discussed the nature of the contract of the 21st April, and showed that by importing the usage it was in effect this:—"L. & Co. (that is to say the defendant through them) promised Kennedy that in consideration that he, Kennedy, would, on the settling day, or within ten days after, produce some owner of shares who would be ready and willing to hand over to their principal (then to be named) scrip

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certificates, and duly executed transfer deeds, they, L. & Co., would accept on behalf of their principal those certificates and deeds, and pay the price agreed on; that thereupon Kennedy's nominee should step into their place in the contract, and L. & Co.'s principal into their place in the contract, and that the relation of vendor and purchaser should be considered as established between the two new parties; whilst all liability *inter se* of L. & Co. and Kennedy should be thenceforth at an end." This he considered was unquestionably what was meant, in fact between L. & Co. and Kennedy; and (according to the view he adopted) the *modus operandi* in law, was this:—"The moment Kennedy produced Sheppard with his scrip certificates and transfer deeds executed, the state of things was at once constituted on which L. & Co.'s (that is Murphy's) promise to accept those instruments attached itself; they stood accepted by the terms of the original contract without more, and the relation of vendor and purchaser was constituted between the transferor and transferee. If this be well founded the result would be that even if L. & Co. had on the 24th of May refused to pay over the money and accept the deeds of transfer, nevertheless the transaction would in the view of a Court of Equity be complete by the mere effect of the original undertaking, and Sheppard could compel Murphy to assume all responsibilities of the shares which he had in equity become the owner of. But it is not necessary to put the case even so high as that, because there was no such refusal by L. & Co. Those gentlemen having had all along in their hands the money of the defendant, sent them by him expressly to complete this purchase, that is to say to exchange it when the settlement day arrived for the scrip and deeds of transfer, they did, as his duly authorised agent, so exchange it; and I agree with the counsel for the plaintiff that their acceptance of the deeds of transfer was as binding upon the defendant as if he had been present, and had taken them with his own hands. The case is thus brought directly under the authority of *Wynne v. Price*, *Evans v. Word*, and *Hawkins v. Maltby* (3 Ch. 188), which in my view of the present case are not distinguishable from it in any particular of the smallest materiality."

*Hodgkinson v. Kelly.*

Next in order of date is the case of *Hodgkinson v. Kelly*,

decided by the Master of the Rolls (Lord Romilly) on the 20th of July, 1868, the appeal in *Sheppard v. Murphy* having been decided in the interval between the argument and judgment. It raised the question between the ultimate seller and buyer, in its simplest form. The broker of the defendant (instructed by him to buy shares in Overend, Gurney & Co.) having bought from a jobber, issued a ticket, which was passed in the usual way through the jobber to the broker of the plaintiff who had sold shares. The transfer executed by the plaintiff (with the certificates) was delivered in due course by the plaintiff's broker to the defendant's broker, who settled the purchase in the usual way and handed the transfer and certificates to his principal. Lord Romilly gave judgment for repayment of calls and indemnity according to the prayer of the bill; observing that the facts raised exactly the same question as that disposed of on the appeal in *Sheppard v. Murphy*, and that he agreed entirely with that decision.

It will be observed that the decision of Lord Romilly in the second suit of *Hawkins v. Maltby* here follows (22 July, 1868) in order of date, and was in accordance with that given two days previously in *Hodgkinson v. Kelly*. The point as to the transfer having been executed with the consideration in blank was not considered to make any difference, it being assumed to be within the authority of the brokers to fill it up.

Next in order of date is the decision by Vice-Chancellor Giffard in *Cruse v. Paine* (July 30, 1868, L. R. 6 Eq. 641), where the contract of the defendant (a jobber) with the plaintiff (the selling shareholder), expressly contained the stipulation "with registration guaranteed;" and on the terms of the contract so expressed, and independently of the decisions (as they then stood) in *Coles v. Bristowe* and *Grissell v. Bristowe*, Vice-Chancellor Giffard held the jobber liable for the consequences of non-registration.

The judgment of Vice-Chancellor Giffard in this case is remarkable as the leading authority on another point; namely, that the buyer's obligation is not a bare obligation of *indemnity* in the literal sense of the word, but an obligation to assume the liabilities pertaining to the subject-matter; so that the seller (or his universal successor such as an executor or trustee

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in bankruptcy) is entitled, although unable otherwise to satisfy the liability, to call upon the buyer to satisfy it. In this way the seller's right of relief is indirectly available to satisfy the primary obligation, which he or his estate would be otherwise unable to satisfy. The principle applies equally to the right of relief which a trustee has against his *cestuis que trust*, or that which the agent has against the principal on whose instructions he acts so as to incur liability. The principle has been given effect to in a case of the last-mentioned kind, by the decision of the Master of the Rolls (Jessel) in *Lacey v. Hill*, *Crowley's* claim, L. R. 18 Eq. 182, 191; and by the same judge in regard to a trust in an unreported case of *Isaac v. King*, July, 1877, arising out of the breaking down of a foot-bridge of which the part-ownership was vested in trustees: and the Master of the Rolls expressed the opinion (which was acted on in the subsequent proceedings) that the liability of the trust estate (assuming the primary liability not to arise from the personal negligence of the trustees), was not measured by the ability of the trustees to meet out of their own funds the claims of the sufferers in the accident.

*Torrington v.  
Lowe.*

On the 19th of November, 1868, a case of *Torrington v. Lowe* came before the Court of Common Pleas. To this case (L. R. 4 C. P. 26) I merely refer here, by way of warning that after the decisions on appeal in *Grissell v. Bristowe* and *Cole v. Bristowe*, and the more complete discussion of the effect of the Stock Exchange usage in those and other subsequent cases, this decision cannot now be regarded as an authority. The action was by the seller for indemnity, against the ultimate purchaser, who had apparently given the name of another person as transferee, to whom the seller had executed a transfer accordingly. The Court held the plaintiff not entitled to be indemnified by the defendant. As the liability in equity in such a case has been established by *Castellan v. Hobson*, the question whether it would be established by law is now of little importance; and the remarks of Mr. Justice Blackburn in this case in *Marted v. Paine* (L. R. 6 Ex. 167), show how little authority, after the subsequent decisions, could be assigned to this case even at law.

In December, 1868, the two cases of *Grissell v. Bristowe* and



*Coles v. Bristowe* were decided by the appellate Courts in Common Law and Chancery.

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On the 3rd December, in *Grissell v. Bristowe*, the Court of Exchequer Chamber, consisting of the Chief Justice of England, the Chief Baron Kelly, Barons Bramwell, Channell, and Pigot, and Mr. Justice Lush, pronounced a unanimous judgment reversing the judgment of the Common Pleas (L. R. 4 C. P. 36).

*Grissell v.  
Bristowe*, in  
Court of Error.

In the argument on the part of the plaintiffs little stress is, for obvious reasons, placed on the point that the persons in whose favour transfers were executed were *not the nominees* of the defendants (the names having been passed to the plaintiff's brokers by another jobber); and the judgment proceeds on the assumption (which might safely be made for the purposes of the case) that they were the defendants' nominees. The sum and substance of the usage as here collected, after careful consideration, from the special case, is stated in the judgment (p. 45) as follows:—"It appears that, in transactions between members of the Stock Exchange, there is an implied understanding that, on the purchase of stock, the jobber shall be at liberty by a given day, commonly called the "name-day," to substitute, if he is able to do so, another party or parties as buyers, and so relieve himself from further liability on the contract, provided that such party or parties be persons to whom the seller cannot reasonably except, and that such party or parties accept the transfer of the shares and pay the price agreed on between the seller and the jobber; in other words, become the buyers of the shares at the price originally agreed on. . . . We are further of opinion, from the particulars of the usage as stated in the case, that it is only when the nominee or nominees of the jobber have paid for the shares,—in other words, have accepted the transfer, and placed themselves in the position of buyers, and taken upon themselves the obligation of the contract,—that the jobber is held to be released." In the opinion of the Court the contract as interpreted by the usage, was that the defendants the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with all its incidents. "When therefore," the judgment continues, "the seller adopted the substituted parties

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as the buyers, and the price was paid by the one and the property transferred by the other, a contract and the relation of vendor and vendees immediately arose between them. In this view alone could the seller be entitled to a specific performance of the contract by the transferees, in the execution of the transfers, and a registration of the shares, or an indemnity in respect of calls,—a right which was held to exist by the Court of Appeal in Equity, in Ireland, in the case of *Sheppard v. Murphy*, the circumstances of which were precisely similar to the present,—a right which it seems impossible to doubt the seller would have against the transferees under the circumstances, and as to which it is only necessary to say, that we entirely concur in the reasoning and conclusion of Lord Justice Christian in the case referred to, to which it seems to us impossible to add anything to advantage.”

*Coles v. Bristowe.*  
Appeal, 5th December, 1868.

The result of the appeal in *Coles v. Bristowe*, decided 5 Dec. 1868 (L. R. 4 Ch. 3), was likewise that the judgment of the Vice-Chancellor was reversed by the unanimous judgments of the Lord Chancellor (Lord Cairns) and the Lords Justices (Page Wood and Selwyn). “According to the course of business as given in evidence,” it is said in this judgment (p. 11), “the contract of the jobber is that at the settling day he will either take the shares himself, in which case he would, of course, be bound to accept and register a transfer and to indemnify, or he will give the name of one or more transferees, names to which no reasonable objection can be made, who will accept and pay for the shares. The jobber may perform either alternative; and if, electing to perform the latter alternative, he sends in names which are accepted, and to which transfers are executed, and those transfers are taken and paid for by the transferees or their brokers, the jobber is then and at that stage relieved from further liability, and the liability to register and indemnify is shifted to the transferees.” Applying these observations to the facts of the case before them the Court were of opinion that the usage of the Stock Exchange having been acted upon and acquiesced in by all the parties to the transaction, the defendants having at the proper time given the names of certain transferees for the shares, and the plaintiff having accepted the names and having prepared and executed transfers to them,

and these transfers having been accepted and paid for by the transferees (*i.e.* through the delivery to their brokers of, and payment by their brokers for, the transfers and certificates of the shares), the defendants thereby duly fulfilled their contract, and any further liability was that of the transferees."

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*Maxted v. Paine* (first action) was a special case decided by the Court of Exchequer on the 18th of January, 1869. It also arose out of the failure of Overend, Gurney & Co. The plaintiff had through his brokers on the 24th of May, 1866, sold shares to the defendant, a jobber, *for the account on the 30th*. On the "name day," being the 29th, the defendant gave the name, as transferee, of one Maxwell, who, as it turned out, had sanctioned the passing of his name for the account of the 15th of May provided a legal transfer of the shares could be effected, but had given no authority for the shares to be carried over from the 15th to the 30th. The plaintiff was not the registered owner of shares, but he had himself purchased shares from one Smith who was a registered holder, and was bound to indemnify Smith accordingly; he procured a transfer from Smith to Maxwell, and sent the transfer to his broker, who in due time tendered it to the broker who had issued the ticket with Maxwell's name upon it. It appeared that this broker had no direct authority from Maxwell at all, but was instructed by one Punchard; and that Maxwell had agreed with Punchard to allow his name to be passed as ultimate purchaser for the account of May the 15th; and he received £1500 from Punchard to enable him to pay for those shares. At the same time Maxwell had stated that he would only accept and pay for the shares if the dealers could give a legal transfer of them. On the 25th of May the ten days allowed by the rules of the Stock Exchange for such transfer having expired, Maxwell returned the money to Punchard; so that on the 29th Maxwell was not in fact a person who had agreed to become a purchaser or who authorised his name to be used as a person willing to accept a transfer. The Court (consisting of Channell, B., Pigott, B., and Cleasby, B.), unanimously held that under these circumstances the defendant had not by passing Maxwell's name as ultimate purchaser or transferee, exonerated himself from liability and that he remained bound to relieve the plaintiff of the calls which the

*Maxted v. Paine*  
(first action).

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*Cruse v. Paine.*  
Appeal.

plaintiff had become bound to pay on Maxwell's declining to do so.

Here in order of date (13 Feb. 1869, L. R. 4 Ch. 441), comes the decision on appeal, by Lord Chancellor Hatherley, of *Cruse v. Paine* (the "registration guaranteed" case), in which the Lord Chancellor entirely adopted the construction and effect of the contract as decided by V.-C. Giffard.

*Maxted v. Paine*  
(second action).

*Maxted v. Paine* (second action) also came before the Court of Exchequer in the form of a special case, and was decided by that Court in the first instance, on the 8th of May, 1869 (L. R. 4 Ex. 203). In respect of the shares in question in this action, the defendant had, on the name-day, given the name of one *Goss* as the ultimate buyer. No objection was made to the name, and the plaintiff executed a transfer to *Goss* of the ten shares. It was afterwards discovered that the brokers issuing the ticket with the name of *Goss*, had bought the shares in respect of which the ticket was issued, by the instructions of and for another person S.; and that the name of *Goss* had been passed in pursuance of S.'s instructions, under an arrangement by which *Goss*, who was a person of no means, consented to allow his name to be passed in consideration of a sum of money paid him. The purchasing brokers as well as the defendant, were ignorant of this arrangement. According to the usage proved as set forth (p. 206) in the special case, at any time before the transfer of the shares has been executed by the seller his broker might object to any name or names given by the jobber, and in the event of the jobber and broker failing to agree the broker may appeal to the committee of the Stock Exchange who, on such appeal, have the power to require the jobber to give to the broker a better name in case they consider the broker to be thereunto entitled. The committee might interfere, even after transfer, where a fraud had been committed. Subject as aforesaid, when a jobber has given a name and the price of the shares has been paid, he has fulfilled all the obligations required of him by the usages of the Stock Exchange in respect of the original bargain. The printed rules of the Stock Exchange were made part of the case. It was held by the majority (Kelly, C. B., Bramwell, B., and Pigott, B., against the dissent of Cleasby, B.), that according to the usage

if the Stock Exchange, the defendant had fulfilled his obligation by passing the name of a person who had authorised his name to be passed as transferee, the plaintiff having made no objection within the time allowed by the usage but having executed and delivered a transfer. Further, in the opinion of Kelly, C. B., the plaintiff must be considered as bound by the usage to recognise Goss as the *ultimate purchaser*: and this seems to have been, though less decidedly expressed, the opinion of Baron Bramwell.

The case of *Davis v. Haycock* which came before the Court of Exchequer on the 2nd of July, 1869 (L. R. 4 Ex. 373), is of little use as an authority. The facts were identical with those of *Sheppard v. Murphy*, except that there was no "continuation" of the transaction to the next account, and admitting the authority of *Sheppard v. Murphy*, the only substantial question was whether the liability, which could be established and enforced in equity, could also be established by way of contract at law. Kelly, C.B., and Pigott, B., gave their opinion that it could be so enforced, and that the plaintiff was entitled to judgment for the amount of calls paid by him. Channell, B., and Cleasby, B., without giving any opinion on this question, were of opinion that the plaintiff could not recover on the declaration as framed. The Court being thus equally divided in opinion, and it being understood that the matter would be carried to a higher Court, Cleasby, B., withdrew his judgment, and judgment was given *pro forma* for the plaintiff. It will be seen that in the similar case of *Bowring v. Shepherd*, subsequently, the plaintiff's right was established by judgment of the higher Court. The refusal of Mellish (4 Ex. 379) to amend his declaration in *Davis v. Haycock*, is no slight confirmation of the authority of the principle ultimately established in *Bowring v. Shepherd*.

*Davis v.  
Haycock*

*Castellan v. Hobson*, decided by Vice-Chancellor James, on the 6th of May, 1870 (L. R. 10 Eq. 47), is a very important case<sup>1</sup> as a companion to *Maxted v. Paine* (second action), and

*Castellan v.  
Hobson.*

<sup>1</sup> Since writing the above, I observe in the recently published work by Mr. Justice Fry and Mr. D. Rawlins on Specific Performance (p. 629), a doubt suggested whether *Castellan v. Hobson*

can be considered an authority since the decision in *Coles v. Britton* and *Maxted v. Paine* (second action). I do not see the inconsistency, and I still think that in *Castellan v. Hobson* we touch solid

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as a guide to show where the ultimate liability lies in such a case. The plaintiff, who was the owner of shares in the Imperial &c., Association, sold them on the Stock Exchange, through his broker to a jobber; and the defendant Hobson, through his broker, agreed with the same jobber to buy shares in the same company for the same settlement. Hobson's broker, by his instructions, gave the name of Banks as the transferee, and this name was accordingly passed to the plaintiff's broker in the usual way as the transferee of the shares sold by him. Banks was one of the defendant's workmen and apparently a person of no means. The plaintiff executed the transfer to Banks, and the transaction was completed in the usual way. Owing to the winding-up of the company, or through Banks not taking the steps to register the transfer, it was never registered, and the plaintiff Castellan remained the legal and registered owner, liable for calls. The Vice-Chancellor, after stating the facts to the above effect, observed that the defence set up by Hobson was this:—"I never had any contract with you at all. I entered into a bargain with the jobber, so did you, and by the novation which took place on the completion of the purchase, there was a contract between you and Banks, but between you and me there was never any contract or privity." Banks being impunctious, the Vice-Chancellor further remarked, might take the liability upon himself, and laugh at the liquidators and decrees of the Court. That was ingenious, but even if it stood there he thought the Court might have found its way to say, if *Castellan* has a right to indemnity over from *Banks*, *Banks* has a right to indemnity over against *Hobson*, and it will pass over the intermediate man and make Hobson do that which he is bound to do. "But the real answer," he went on to say, "is, that it is not a question of vendor and purchaser, it is not a question of specific performance at all; it is a question of trustee and *cestui que trust*. The result of the transactions is, that *Castellan*

ground. The result is to give a direct remedy against the person who is at all events ultimately liable. I am indebted to the note in the above-mentioned work for a reference to another decision of V.-C. James in *Nickolls v. Fur-*

*neux* (W. N. 1869, p. 118), proceeding on a similar principle. The same principle is again applied by the Lords Justices James and Mellish, affirming the decision of Vice-Chancellor Bacon, in *Brown v. Black*, L. R. 8 Ch. 939.

remains the legal owner of the shares without any beneficial interest in them. As legal owner he has remained exposed to liabilities, and he is entitled to indemnity from the real equitable owner of the shares, for whom he was trustee. For whom, then, is he trustee? He is trustee for *Hobson*, not for *Banks*. *Banks* by the transaction has never acquired any legal or equitable right or interest whatever in these shares. He is a mere name. In truth, cases have frequently occurred in this Court in which what is called the intermediate trustee of a mere equity has been disregarded altogether. The cases are collected in *Lewin on Trusts*, p. 709. . . . *Castellan*, therefore, being the legal owner, and *Hobson* being the beneficial owner, and *Banks* being a mere name interposed between the two, *Hobson*, the real beneficial owner, the *cestui que trust* for whom *Castellan* is a trustee, is bound to indemnify him against the calls which have been made." The form of decree followed that made in *Evans v. Wood*.

*Allen v. Graves* (31 May, 1870, L. R. 5 Q. B. 478) was a case of a contract between two members of the Stock Exchange, in which, on a special case, the usage regarding the passing of a name was stated as follows:—"If the person or persons whose name or names are given cannot be reasonably objected to by the vendor, and if they by themselves or their agents accept the transfer of the shares (although they do not execute the same) the jobber, upon the price of the shares being paid to the selling broker, is relieved from all further liability." It was held by the Queen's Bench that the defendant having offered the name of a foreigner residing abroad, did not offer a person to whom no reasonable objection could be made.

*Allen v. Graves*,  
31st May, 1870.

*Bowring v. Shepherd* was another of the Overend, Gurney & Co. cases, decided on the 3rd of February, 1871 (L. R. 6 Q. B. 309), in the Exchequer Chamber (in review of a judgment of the Queen's Bench *pro forma* given in accordance with *Davis v. Haycock*). It establishes the point that the liability of the ultimate buyer to the ultimate seller, which according to *Sheppard v. Murphy* may rest either on privity of contract or on privity of estate, can be safely rested on privity of contract, and, even before the Judicature Act, might be established by an action at law. The special case in which the facts are submitted

*Bowring v.*  
*Shepherd.*

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for judgment, contains a very full and clear statement of the usage, an extract of which I subjoin. It must be mentioned in explanation, that Messrs. Cawthorn & Co. were brokers who had bought from Mr. Kitchen (a jobber), for the account 15th May, seventy shares for the defendant and thirty shares for other persons, and had also bought from another jobber for the same account, thirty shares more for the defendant. Having stated that, according to the usage of the Stock Exchange, Messrs. Cawthorn & Co. were bound, upon the name-day, being the day before the 15th of May, to pass to Mr. Kitchen on account of such 100 shares a ticket containing the names or name of the buyer or buyers, and that accordingly on the 14th May they delivered to him a ticket with the name of the defendant as buyer, in the form usually adopted, having express instructions from the defendant to do so; the case proceeds to state the usage as follows:—

“There is a general practice or custom on the Stock Exchange for the holder of such a ticket to deliver or transfer it to any other member of the Stock Exchange (whether a broker or jobber in shares) from whom he may have purchased the like number of shares in the same company, for the same account, and for such person in turn to deliver or transfer it to another such person under the like circumstances, and so for the ticket to pass from hand to hand until it reaches the hands of some broker or dealer, who, or whose principal, has sold without also having purchased the shares for that account. The person on whose behalf such broker or dealer has sold, whether he sold on his own behalf or on behalf of a principal, is hereinafter referred to as the ‘ultimate seller.’ Moreover, if any person into whose hands the ticket thus comes, has not purchased the whole of such shares from the same person, the practice or custom is for him to divide or split up such ticket among the several persons from whom he has in the aggregate purchased the amount of shares mentioned in it, and for that purpose to make copies (technically called ‘splits’) of such ticket, substituting in each copy the number of shares purchased from the person to whom he delivers it, and adding his own name as the person splitting the ticket: and each of these ‘splits’ is thenceforward delivered or transferred from hand to hand, in like manner as the original ticket, until it reaches the hands of some broker or dealer, who



or whose principal has sold without having also purchased the shares for that account, and who or whose principal would therefore, as to the shares included in that 'split,' be the 'ultimate seller.' The giver of the ticket, whether a whole or split, at the time when he gives it pays or receives, as the case may be, to or from the person to whom he gives it, the difference, if any, between the price named in it and the price at which the giver of the ticket bought of the person to whom he passes it.

"The ticket, whether a whole ticket or a split, having reached the broker of the ultimate seller, the practice or custom then is, for him to procure a transfer made direct from the holder of the shares to the person named in the ticket as transferee. The price inserted in the transfer as the consideration is that named in the ticket. This transfer, executed by the transferor, the broker of the ultimate seller delivers to the broker or jobber who issued the ticket, and who is therein named as the person to pay. He, if not himself a principal, delivers it to his principal to be accepted or executed by the transferee. No intermediate transfers are required. The person who issued the ticket pays the sum therein named to the broker of the 'ultimate seller,' or to the ultimate seller himself if he acted as his own broker, and the ultimate seller receives from his broker the price at which he sold, the difference (if any) having been paid or received by the intermediate brokers or dealers at the time of passing the ticket as before stated. The broker of the 'ultimate seller' (by thus delivering the transfer according to the ticket—whether a whole ticket or a 'split') is, by the rules of the said Stock Exchange, deemed to have fulfilled the contract with his immediate buyer and is entitled to payment, and in case of payment being refused by the member issuing the ticket, such buyer must make immediate payment.

"Also by the rules of the Stock Exchange every person passing a ticket is required to write on the back of the ticket the name of the member to whom it is passed. A member dividing a ticket is to retain the original ticket that access may be had to it should any portion of the shares have been sold out, and the member who has passed on the original ticket is required to trace it in the event of any portion of the shares having been sold out. Shares are said to be sold out when

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*Maxted v.  
Paine* (second  
action in Court  
of Error).

default having been made by a broker in giving the name of a buyer, the person who sold sells, as he is entitled to do, in public on the Stock Exchange, by which means a buyer is found, and the broker in default is bound to pay the difference."

*Maxted v. Paine* (second action) went, on error from the judgment of the Queen's Bench, to the Exchequer Chamber, where on the 11th of February, 1871, the judgment of the Court below was affirmed by all the judges except Mr. Justice Lush, who dissented. There was however some divergence between the reasons given by the judges who formed the majority. The judgment, delivered by Mr. Justice Montague Smith, concurred in by Justices Keating, Mellor and Brett, affirmed the decision of the majority of the Court of Exchequer, on the ground that Goss having assented to have the transfer made to him, and the plaintiff having transferred accordingly, every thing had been done according to the usage of the Stock Exchange, to exonerate the broker. They did not however state between whom, in their view, the new relation by way of contract was constituted; although they threw out the suggestion that the plaintiff might have his relief against the real purchaser, as in *Custellan v. Hobson*. Mr. Justice Lush dissented on the ground that the contract, and in his view the effect of the usage, was that the jobber was bound to give the name of the real purchaser. He seems to have formed the opinion that the plaintiff was debarred from his remedy against the real purchaser, by having transferred to the nominee. Mr. Justice Blackburn concurred in the result arrived at by the majority, but on grounds demanding particular consideration, which I shall be in a better position to give after stating the decision of the House of Lords in *Nickalls v. Merry*. The remaining judgment is that delivered by Chief Justice Cockburn, who concurred in the result arrived at by the majority, on the ground that, the effect of the transaction was to constitute the nominee, as between him and the plaintiff, in effect the purchaser of the shares, and that he was accepted as the purchaser by the plaintiff.

*Rennie v.  
Morris* (since  
overruled),

In *Rennie v. Morris*, Lord Romilly as Master of the Rolls (11 January, 1872, L. R. 13 Eq. 203), gave a decision exonerating a jobber who had passed a name which, some time after a

transfer had been executed and delivered, was discovered to be the name of an infant. This decision is however overruled by that of the Lords Justices in Chancery, confirmed by the House of Lords in *Merry v. Nickalls* and *Nickalls v. Merry*.

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*Merry v. Nickalls* came before the Lords Justices in Chancery, in July, 1872 (L. R. 7 Ch. 733), on appeal from Vice-Chancellor Bacon, who had approved and followed Lord Romilly's decision in *Rennie v. Morris*. The plaintiff had through his broker sold shares in a company called the General Estates Company, to a jobber on the Stock Exchange, and the transaction was carried through in the usual way. Two years afterwards the Company was ordered to be wound up; the plaintiff found that he was still on the register, and discovered that the person to whom he had transferred was an infant. The Lords Justices (James and Mellish) considered that *Maxted v. Paine* (first action) was rightly decided, and that the jobber having passed a name, as purchaser, of a person who had given no authority to the broker who issued the ticket to insert his name, was not exonerated. It followed that the defendant having passed the name of an infant, who was incapable of giving authority, was not exonerated. "If," says Lord Justice Mellish (p. 759), "the person whose name is on the ticket is willing and able to fulfil the contract, then, as soon as the transfer is made to him, the jobber is discharged. But in the present case, there being no person willing and able to fulfil the contract, and the person whose name was on the ticket having given no authority to the jobber to put his name there, the jobber is not discharged."

*Merry v. Nickalls.*

The defendant Nickalls appealed to the House of Lords, and the appeal, *Nickalls v. Merry*, was decided on the 18th of March, 1875 (L. R. 7 H. L. 530), by Lord Cairns (Chancellor) and Lords Chelmsford and Hatherley, who unanimously affirmed the decision of the Court of Chancery. Lord Cairns referred at length to the usage of the Stock Exchange as expounded in the evidence of Mr. de Zoete, which I here extract at length. The statement, it will be observed, is substantially the same as that given in the special case in *Bowring v. Shepherd*, but each statement will be found instructive as supplementing and explaining the other.

*Nickalls v. Merry, House of Lords.*

"In the case supposed," he says (L. R. 7 H. L. 539), "where

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the jobber would stand as purchaser he would on the day preceding such account day (which was usually called the 'name day'), be bound to pass to the broker a ticket containing the name of a person, or of several persons, *as the purchaser or purchasers* of the said shares; or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have been bound himself to take to the shares. If the jobber had failed to pass to the broker such a name or names by the name day, the selling broker could have sold out the shares against him, and have compelled him to pay any loss thereon. Until the name day it was not seen who might stand ultimately either as purchasers or sellers, or, in other words, who might be the persons to transfer or to take transfers of shares, and until then a jobber might have had a great many transactions both of buying and selling with the same brokers or jobbers or with various brokers or jobbers. On the name day, in the case supposed, if the jobber having purchased had sold again, a ticket, containing the name of the person to whom the shares were to be transferred, would have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through the hands of the other intermediate sellers and buyers in succession, who, whether acting as jobbers or as brokers, had dealt in the shares, until it reached the hands of the original selling broker. Every member passing a ticket was required to write on the back of it the name of the member to whom it was passed; such ticket would also have contained the amount of purchase-money agreed to be given for the shares by the ultimate purchasing broker, and also a note that he would pay the same. So many transactions of this kind took place during the account, that on the name day the ticket of necessity only remained in the possession of an intermediate jobber or broker for the time required to take the particulars of it. It sometimes happened that the same ticket passed through the same members' hands several times in fulfilment of bargains made with other members, and, as a matter of fact, he had neither the opportunity, time, nor the means for making enquiries respecting the name so passed. The original selling broker would not have been bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of

ten days after the account day, and during the ten days the said purchasing broker could not have bought in the shares against the seller. During this time it was open to the original selling broker to object to the name passed by his buyer, in which case such buyer would of course have passed on the objection to the person from whom he received the name as hereinbefore mentioned, and practically such buyer would have had no liability or interest in the question, as whatever grounds there might have been for objecting to the name would have had to be met by the person from whom it emanated, and who had originally issued the ticket, and the committee of the said Stock Exchange would if appealed to by the selling broker, have decided as to the validity of any such objection, and would have required another name to be given in case they had considered it right to do so. But after the lapse of these ten days the selling broker was required to deliver the certificates and transfer of the shares to the said ultimate purchasing broker, or in default thereof, the latter could have bought in the shares against the seller. The usual course of business was for the selling broker to deliver the transfer, together with the corresponding ticket, to the said ultimate purchasing broker from whom he received the purchase-money. The said ultimate purchasing broker did not know to whom his ticket had been ultimately passed until the delivery of the transfer. According to the long-recognised and well-established rules and usages of the said Exchange, if the original selling broker did not deliver his transfer and certificates and obtain payment of the purchase-money within fifteen clear days from the name day, his immediate buyer was released from all loss caused by the default of the ultimate purchasing broker to pay for the shares, and the latter would alone remain responsible; in like manner, if the member who issued the ticket containing the name of the intended transferee of the shares did not buy in or attempt to buy in the same shares within fifteen days from the account day, his immediate seller was released from all loss caused by the failure of any member through whose default the shares were not delivered to, and the purchase-money paid by, the ultimate purchasing broker, the jobber had fulfilled all the obligations required of him by the rules and usages of the said Stock Exchange in respect of his contract."

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In commenting on this usage Lord Cairns observed that the words used by Mr. de Zoete, "the name of a person as the purchaser of the said shares" clearly implied the name of a person who can and will purchase, and would have no application to the name of a non-existing person, a lunatic, an infant, a married woman, or a person who has given no authority to use his name. And he held it clear that the jobber was not discharged unless the person whose name he proposes is competent to contract. As to whether any obligation was thrown upon the seller by the rules of the Stock Exchange to enquire as to the capacity and willingness to contract of the person whose name was given, he was satisfied from the evidence that the interval given before completion was to give an opportunity to enquire into the responsibility and not the capacity and willingness of the name given, and that the seller, if content to waive enquiry into the responsibility, was entitled to assume the capacity and authority. He entirely agreed with what was said by Lord Justice Mellish: "If the person whose name is on the ticket is willing and able to fulfil the contract, then, as soon as the transfer is made to him, the jobber is discharged." But in the present case, there being no person willing and able to fulfil the contract, and the person whose name was on the ticket having given no authority to the jobber to put his name there, the jobber is not discharged.

Lord Chelmsford expressed his view of the jobber's contract as follows (L. R. 7 H. L. 544):—"It is at first a temporary and conditional contract, but it becomes absolute upon his failure to furnish by the name day the name of a person capable and willing to become the transferee of the shares, so that the seller by executing a transfer may make with him a new contract in substitution of the original one with the jobber. This being the nature of a jobber's contract, it follows as a consequence that the appellant did not perform what he undertook by giving the name of a person under disability with whom no new binding contract could be made to be substituted for his own." In regard to the argument that the plaintiff's remedy, if any, was against the real buyer or his broker, he said (p. 546):—"Assuming that the respondent, according to *Castellan v. Hobson*, might have proceeded against the real

buyer to compel him to indemnify him against the payment of calls, that could not have the effect of depriving the respondent of his remedy against the appellant for the non-performance of his contract. If this were so, the consequence would be that although the liability of the appellant to an action for his breach of contract continued, the remedy against him would be gone. It would be a strange answer to an action which admitted (as it must) that there had been a non-performance of the contract, but alleged that the defendant was discharged by reason of the plaintiff having a remedy against another person upon a liability of a totally different description."

Lord Hatherley (p. 547) states the effect of the contract of the jobber, with the usage incorporated, to be as follows:—"I will give to you," says the jobber, "the name of a person who has authorised me to give his name instead of my own, and who will perform my contract for me; and when that name is given to you, you shall have an opportunity of enquiring into that person's name (ten days, I think is the time allotted for such enquiry), and you shall thereby satisfy yourself that the person I name is a person whom I may reasonably propose to you as the person who is to perform the contract which I have entered into with your broker, and that he is a person whom it is reasonable for me to substitute for myself as contracting with you—i.e. you shall have the means to satisfy yourself as to his responsibility in point of means to fulfil that engagement which I have taken upon myself,—after which the contract which I have made will cease." He considered the usage so embodied was reasonable; and that handing in a name without proper authority to give it has been held (sc. in *Maxted v. Paine*, first action) as it ought to be held, to be not a compliance with the rules of the Stock Exchange, and, therefore not to be a substitution of another person for the original vendor.

It will be remembered that I reserved for consideration in connection with *Nickalls v. Merry* the judgment of Mr. Justice Blackburn in *Maxted v. Paine* (second action). The effect of that judgment was briefly this:—that a member of the Stock Exchange who has bought shares for the account from another member of the Stock Exchange (there being no essential distinction in this respect between a broker and a jobber),

Judgment of  
Mr. Justice  
Blackburn in  
*Maxted v.*  
*Paine* (second  
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fulfils his contract, so far as relates to the transfer of the shares, by delivering on the name day a ticket really issued by a member of the Stock Exchange; and that transfers of the shares into this name (with the scrip certificates) having been delivered by the ultimate holder of the ticket to the member issuing the ticket, and the price having been fully paid to the holder of the ticket, all intermediate buyers are released, and there is a complete novation of the original contract; *the new and substituted contract* being between *the member issuing the ticket or his principal*, and the ultimate holder of the ticket or his principal. Dissenting however from the judgment in *Masted v. Paine* (first action), he thought it not necessary, in order to exonerate the intermediate buyer, that the name passed by him should be the name of one who had really authorised his name to be given; he considered that the nominee was not necessarily dealt with as the purchaser; nor, apparently, did he consider that the nominee on the ticket and the member issuing the ticket must necessarily be dealt with as holding towards each other the relation of principal and agent.

Now, although it is finally decided, by the judgment of the House of Lords in *Nickalls v. Merry*, that in order to exonerate the jobber, it is necessary that the nominee on the ticket has really authorised his name to be given; it may become necessary, in regard to the question *who is liable*, to analyse further the *modus operandi* of the novation, and upon this point, this judgment of Mr. Justice Blackburn is important and suggestive. There seems great force in the arguments by which he establishes the proposition that the new and substituted contract is made between *the member issuing the ticket or his principal* and the member who is the ultimate holder of the ticket or his principal; and there seems nothing in this proposition inconsistent with what is decided in *Nickalls v. Merry*. Adopting this view of the *modus operandi* of the novation, the question remains whether the two members of the Stock Exchange who are ultimately brought together, contract with each other as *principals*. According to this judgment of Mr. Justice Blackburn they do so contract. But with deference I must point out what appears to me a material distinction. It is no doubt



the clear usage of the Stock Exchange that members do in their primary contracts, contract with each other *as principals*. But *non constat* that this is the case in regard to the secondary contract which is made by the passing of the ticket. On the contrary it would seem more consistent with the tenor of the document that, so far at least as regards the liability on the shares, the member (who in this case is presumably a broker) undertakes as agent for the person named on the ticket.

It is clear that, if the person named on the ticket is the real buyer, *he is*, at all events, liable by the direct operation of the new contract. If this person is not the real buyer, then if the real buyer can be discovered and is solvent, the safest course for the seller to enforce his indemnity will be to sue the real buyer on the principle of *Castellan v. Hobson*. The question remains whether the broker of the ultimate buyer, who issues the ticket, incurs a personal liability for calls on the shares. If I am right as to the nature of his contract, there would be great difficulty in establishing such a liability against the broker, whether the real buyer is disclosed or not. But assuming, as will generally be the case, the real buyer to be a responsible person, the question is not of much practical importance. There will never be any difficulty in *discovering* the real buyer. For it will be cheaper for him to be sued directly, than to be sued for relief by the trustee in bankruptcy of his nominee. For it is clear that the person whose name is on the ticket with his own authority could have no defence to an action by the seller.

It will be gathered from the above cases and the usage as explained in the evidence, that the ticket of which the seller's broker is the ultimate holder, is, in the usual and ordinary course of business, passed to him by the jobber to whom he in the first instance sold the shares. *Grissell v. Bristowe* furnished an instance where this was not the case. There had been a set-off of transactions between the plaintiff's brother and the defendant with whom he made the contract for the plaintiff (as seller) in the first instance; and the name into which the plaintiff transferred the shares had been passed to his broker, not by the defendant but by another member of the Stock Exchange. The

*Quere*, whether the seller's broker setting off transactions with the jobber and having a name passed to him by another member of the Stock Exchange, establishes a privity with the nominee? *Seemle* that he does.

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plaintiff could only put his case on the footing that he had transferred according to the contract. But if his claim had been against the transferee, it would have been fairly questionable whether his broker, by taking a ticket from a person with whom the plaintiff had no antecedent contract, established a privity between the plaintiff and the person named on the ticket so as to bind the latter.

The question, stated generally, is this :—A. is a broker who for a customer sells a parcel of shares for the settlement to B, a jobber. A. and B. have other transactions resulting by the settling day to a complete balance, or in an excess of sales by B. to A. Is A., according to the usage, entitled to set off with B. the shares in the first instance sold to him and to get a ticket or a name for these shares from some other member of the Stock Exchange instead ?

The situation may arise in one or other, or in a combination, of two ways. *First*, A. may have bought shares for the same settlement for other customers. In this case, instead of going through the idle ceremony of passing to B. a ticket which B. will immediately pass back to him, A. will fill up the transfer to his buying customer with the name of his selling customer; and I apprehend that this being done and the transfer returned to the broker who settles the payment and sends the transfer and scrip to his buying customer, the latter would be bound exactly as if the name had been passed by the jobber.—*Secondly*, A. may have speculated on his own account in shares for the settlement. *Ex hypothesi* he does not *take up* any shares on his own account; and the necessary effect of his setting off transactions with B., is that he becomes entitled to get from some other member of the Stock Exchange, a ticket or tickets for the number of shares sold to B. on the customer's account. If A. gets a ticket accordingly, and procures from his customer a transfer to the person named in the ticket, it is difficult to see how the circumstance that the ticket has not been *actually* passed by B. to A. can be in any way material. The ticket comes to A. through the machinery of the Stock Exchange in consequence of the sale of the shares to B., and only arrives by another (and probably shorter) route than if it had actually passed through B.'s hands. It is to be observed however that

the practice of a broker dealing in shares on his own account is discountenanced, if not absolutely prohibited, by the rules of the Stock Exchange (Rule 41).

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I now advert to some cases arising out of failure on the part of the broker or his principal to meet engagements incurred on speculative accounts, particularly in relation to the rule of the Stock Exchange by which the accounts of a defaulting member are peremptorily closed.

In *Duncan v. Hill* (L. R. 6 Ex. 255, 8 Ex. 242), the plaintiff, who was a member of the Stock Exchange, bought, as broker by the instructions of the defendant, a quantity of stocks and shares in various undertakings, for settlement on the 15th of July, 1870. Subsequently by the request of the defendant, the shares were *carried over* to the account of 29th July, a transaction which involved payment on the 15th, of a difference of £1688 19s., for which the plaintiff became primarily liable. An account showing this sum to be payable on the 15th, was duly furnished by the plaintiff to the defendant. He did not pay it, but the plaintiff paid it on the 15th. On the 18th, the plaintiff was declared a defaulter on the Stock Exchange, and according to the rules, his accounts were peremptorily closed; resulting in a difference, on account of the shares bought for the defendant, of £6013 13s. 5d. The *closing* of the accounts of a member of the Stock Exchange comes in effect to this, that the time for performance of all his contracts is advanced; and in default of immediate performance, each contract is, in effect, rescinded, and instead thereof the defaulting member is held liable for the "difference" ascertained by reference to what is called the "making up" price of the day.

The action was really that of the plaintiff's creditors suing in his name; and the question was whether the plaintiff was entitled to recover, in an action at law against the defendant, the whole of the £6013 13s. 5d. He was admittedly entitled to recover the £1688 19s. paid on his account at the settling day.

The Court of Exchequer held the plaintiff entitled to recover the whole £6013 13s. 5d.: but this decision was reversed by the Exchequer Chamber, on the ground that, whereas the action was

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brought to recover a loss incurred by the plaintiff by reason of his having acted as agent for the defendant; it appeared that the agent was subjected to the loss in question, not by reason of the contract into which he was authorised to enter by his principal, but by reason of a default of his own—i. e. by reason of his own insolvency brought on by want of means to meet his other primary obligations. Consequently, it was said, there was no promise which could be implied on the part of his principal to indemnify him; and that in the present case there was certainly no express promise to this effect. It was observed that there was no failure by the defendant in any part of his undertakings, nor any evidence that the insolvency of the plaintiff was caused by his having entered into the contract for the defendant.

*Lacey v. Hill,  
Scrimgeour's  
Claim.*

In the case of *Lacey v. Hill, Scrimgeour's Claim*, L. R. 8 Ch. 921, evidence was given of usage of the Stock Exchange for the broker, in the case of his principal becoming notoriously unable to protect him from loss on speculative accounts, to close such accounts immediately by selling on the best terms amounts of all stocks and shares equivalent for those he may have contracted to take, and by purchasing amounts of all stocks or shares equivalent to those he may have contracted to deliver. This rule was adverted to in the judgment of Lord Justice Mellish as a reasonable one, and such as a Court of law would give effect to. In the actual case before the Court the stocks purchased had been actually paid for with the broker's money. The principal, on a large fall taking place in stocks in which he had speculated, shot himself on the afternoon of the 15th July, 1870, which was a settling day: and the broker to avoid further loss, immediately sold, although he had been under contract with his principal to keep the account open until the next settling day. According to the judgment of both the Lords Justices (James and Mellish), affirming the decision of Lord Romilly, the broker was entitled, on the principles of common law, without reference to the usage of the Stock Exchange above mentioned, to indemnity from his principal's estate.

*Lacey v. Hill,  
Crowley's Claim.*

In *Lacey v. Hill, Crowley's Claim* (L. R. 18 Eq. 182), which was a claim by another broker, arising out of the same circumstance, evidence of usage was given to the same effect. In this

case the brokers had two days before the settling day expressly informed the principal that if he did not pay them in full on the settling day, they could not stand, or in other words their own accounts would be peremptorily closed. He promised to pay in full accordingly, and on the strength of this they continued some of the stocks. He did not pay, but shot himself as before stated. In consequence of his failure to pay, and of that alone, as appeared by the evidence (and the case therefore in this respect differing from *Duncan v. Hill*), the brokers were on the following day declared defaulters, and their accounts were closed accordingly. The Master of the Rolls (Jessel) decided the case in the plaintiff's favour on two grounds:—first, that the brokers, having only “continued” on the faith of a promise which was not kept, were entitled to close immediately; and secondly, upon the usage given in evidence in the case as above stated. It will be observed that this decision assumed the case to be the same as if the closing of the accounts had been the voluntary act of the brokers. It was not therefore necessary to consider the effect of the peremptory closing of the broker's own accounts, or to lay stress on the distinction between the facts in evidence and those in the case of *Duncan v. Hill*. That distinction must, however, be pointed out in order that the effect of the decisions may be correctly appreciated.

I close this review of the cases on the Stock Exchange with a case (adverted to p. 154, *supra*) on the question whether speculative contracts, as commonly entered into on the Stock Exchange, are void as wagers, or time-bargains within the meaning of 8 & 9 Vict. c. 109, s. 18. The case is *Thacker v. Hardy*, 4 Q. B. D. 685, an action brought by the broker against his principal, for indemnity in respect of contracts of this nature. The facts, which may be taken as typical, were found by Mr. Justice Lindley (p. 686) as follows:—*First*, that the defendant was a speculator, and the plaintiff knew him to be so; *secondly*, that the defendant employed the plaintiff to speculate for him on the Stock Exchange; *thirdly*, that the defendant knew, or must be taken to have known, that, in order to carry out the transactions, the plaintiff would have to enter into contracts to buy or sell, as the case might be, and in

*Thacker v.  
Hardy.*

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order to protect himself and the defendant, to enter into other contracts to sell or buy respectively; *fourthly*, that there was, in fact, no other way in which the plaintiff could speculate for the defendant as he desired; *fifthly*, that the plaintiff did buy and sell accordingly; *sixthly*, that the defendant never expected nor intended, to accept actual delivery of what the plaintiff might buy for him, nor actually to deliver what he might sell for him, and that the plaintiff knew that the defendant never expected or intended to do so; *seventhly*, that the defendant, nevertheless, knew that he incurred the risk of having to accept or deliver as the case might be, but was content to accept that risk, in the expectation and hope that the plaintiff would be able so to arrange matters as to render nothing but differences actually payable to or by him as the case might be; *eighthly*, that unless the plaintiff could arrange matters as expected, the defendant would be unable to pay for what was bought for him or deliver what was sold for him, and that the plaintiff knew perfectly well that the defendant would be unable to do so." In giving his decision, which was in favour of the plaintiff, Mr. Justice Lindley observed (p. 689) that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that in his view of the evidence, the defendant did authorise the plaintiff to incur liability by buying and selling as above described. He observed that a time bargain properly so called was a bargain for the sale of stock made *on the understanding* that it should not be carried out, but that only a difference should be paid; that such bargains were very rare, and this was what he understood the witnesses to mean when they said there were no such things as time bargains on the Stock Exchange. He concluded with an observation which is material as to the limitation already adverted to in the effect of *Duncan v. Hill*. "The defendant was himself unable to meet his engagements, and that was the principal cause of the plaintiff becoming a defaulter. The inability of the defendant to continue his speculations gave the plaintiff the right to close all the defendant's accounts; that appears from a celebrated case in Chancery, *Lacey v. Hill*. Whether they were closed by the plaintiff or by the Stock Exchange committee, is I think, immaterial, it

being proved that the defendant was in any way prejudiced what was done." The Court of Appeal sustained this judgment both as a finding of the inferences in fact, and as to the conclusions in law. They distinguished the case from *Grizeod v. Blane* (11 C. B. 526) where, according to the findings of the jury, neither party intended that there should be an actual buyer or seller, and it was simply a bargain that according to the price of stock on a future day the parties should respectively gain or lose, and the transaction was accordingly held void as being in the nature of a wager.

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#### 4. *Masters of Ships.*

I shall consider masters of ships in relation chiefly to their agency, under exceptional circumstances, for the owners of the goods carried; touching very lightly on their powers and duties in their ordinary character as agents for the shipowner. For a full account of these, I refer to the special treatises on shipping, and particularly to the very able and complete treatise of the late Mr. Joseph Kay on the Law relating to Shipmasters and Seamen. I shall here confine myself to citing, in regard to the master's authority to pledge the credit of his owners for supplies to the ship, the opinion of Lord Abinger in *Arthur v. Barton* (6 M. & W. 138), which has been generally accepted as a correct and authoritative expression of the law on the subject.

Master in his exceptional character as agent for the owner of the goods carried.

His authority as agent for the shipowner to pledge his credit for necessities supplied to the ship.

"Under the general authority," he says, "which a master of a ship has he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore if the owner, or his general agent, be at the port, or so near it as to be reasonably expected to interfere personally, the master cannot unless specially authorised or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary.

"But if the vessel be in a foreign port, where the owner has

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no agent, or if in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorises the master to pledge the credit of the owner.

"But then the further question arises, for what things he may pledge the owner's credit? This also is limited, either to such things as are necessary, or (as Lord Tenterden in his book on Shipping, and Mr. Justice Story in his valuable book on Agency, very clearly lay it down) to such things as are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case."

In accordance with the law so laid down, it has been decided by the Court of Common Pleas (Brett and Denman, JJ.) that the presumption of authority entirely fails where the owner of the ship has, in the port where she is lying, an agent authorised and ready to supply the ship's requirements (*Gunn v. Robert*, L. R. 9 C. P. 331). Mr. Justice Brett seems not to think it material (though found to be the fact) that the master was aware of there being an agent so authorised; it being also found that the person who furnished the supplies might, by reasonable enquiry, have ascertained the fact.

Generally he is agent for the shipowner only.

Generally and in the ordinary course of things, the master is agent for the shipowner, and has nothing to do with the cargo except to fulfil, as agent for the shipowner, the contract to carry the cargo to its destination.

May act for the owner of the cargo by express mandate.

The master, however, as the person in actual custody of the goods, may act upon such directions of their owners regarding them, as are consistent with the shipowner's interest under the contract of carriage. Thus, if the natural termination of the voyage is prevented by a cause excepted by the contract, he may arrange with the consignees for delivery at an intermediate port, it being an implied term of such an arrangement that freight is payable *pro rata parte itineris* (*Christy v. Row*, 1 Taunt. 300). If it is practicable to complete the voyage, I apprehend the master would not, in general, be justified, having regard to the interests of the shipowners, in delivering at an intermediate port at the request of the consignee, except on payment of the freight for the whole voyage. But if, on putting



in for repairs at an intermediate port, the goods are found to be, from sea damage, in such a state that they could not be carried on without great deterioration, it would be the master's duty, as a reasonable course, to deliver them up to the consignee demanding them and offering payment of freight *pro rata* (*Notara v. Henderson*, L. R. 5 Q. B. 353, 7 Q. B. 235).

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In cases of shipwreck or other emergency which may render it necessary, in the interest of the owners of the cargo, that the goods should be dealt with in some other manner than by forwarding them in the ship to the port of destination; it is the duty of the master, if possible, to communicate with the consignees, and obtain their directions and strictly follow them (*Acatos v. Burns*, L. R. 3 Ex. D. 282). But in a case of unforeseen and unprovided necessity, where no correspondence can be had with the owners of the goods within reasonable time (*The Gratitude*, 3 C. Rob. 237; *The Buonaparte*, 8 Moo. P. C. 473; *Wilson v. Millar*, 2 Stark. 1; *Cargo ex Hamburg*, 2 Moo. P. C. N. S. 289, 33 L. J. Adm. 116)—that is to say, where the necessity of action must arise before an answer can in reasonable calculation be expected (*The Lizzie*, L. R. 2 Adm. 354; *The Australasian, &c., Co. v. Morse*, L. R. 4 P. C. 222)—the master is justified in assuming, and is bound to assume, the character of agent for the owners of the goods. He is then bound to act for the best and do with the cargo as a prudent owner would have done, and, as a correlative right, is entitled to charge its owner with the expenses properly incurred in so doing (*The Gratitude*, *supra*; *Cargo ex Argos*, L. R. 5 P. C. 134, 165).

In emergency, must communicate with them, if possible.

Failing means of communication, and from the necessity of the case, may act upon implied mandate.

*Prima facie* it is his duty, having regard to the interest of the shipowner, as well as to that of the owner of the cargo, to carry on the goods in the original bottom, and to have the ship repaired for that purpose (*Duranty v. Hart*, *Cargo ex Hamburg*, 2 Moo. P. C. N. S. 289, 319). If this is impracticable he may tranship the cargo, and it is his duty to carry the goods to their destination in this way, if practicable, rather than sell them (*Cannan v. Meaburn*, 1 Bing. 243). The criterion whether it is, in a mercantile sense, practicable to carry the goods to their destination, is, whether they can be brought there in a market-

*Prima facie* he ought to carry on cargo in original bottom, if possible. If this is impracticable, he may tranship.

Criterion of what is practicable is whether goods

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are worth the expenses of sending them on. In estimating this no account is taken of the freight chargeable under bill of lading.

In case of necessity, and as a last resource, the master is empowered to sell the goods.

able condition and so as to be worth more than the cost of carriage. And in calculating for this purpose the cost of carriage account must be taken of the cost of unloading, drying and restoring, warehousing and reshipping, but not the freight, except only in the case of the freight in the substituted bottom exceeding the freight originally contracted for, and then only in the excess (*Rosetto v. Gurney*, 11 C. B. 176; *Farnworth v. Hyde*, L. R. 2 C. P. 204).<sup>1</sup>

In the extreme case only, where it is impracticable either to repair or to tranship, or to place the goods in safe keeping on the owners' account until he can deal with them, the master may (because he must) sell the goods on behalf of the owners (*Underwood v. Robertson*, 4 Camp. 138; *Freeman v. East*, *India Co.*, 5 B. & Ald. 617; *Benson v. Dent*, 8 Moo. P. C. 419; *Van Omeron v. Dowick*, 2 Camp. 42; *Campbell v. Thompson*, 1 Stark. 490; *The Australasian, &c., Co. v. Morse*, L. R. 4 P. C. 222). In such a case, the shipowner has no claim for freight, even *pro rata* (*Vlierboom v. Chapman*, 13 M. & W. 230). If the title of the purchaser from the master is contested, it lies upon that purchaser to prove the necessity; and the weight of the burden of proof in such a case is strongly illustrated by the case of *Atlantic Mutual Insurance Co. v. Huth*, 16 Ch. D. 474. It would appear from this case that it is hardly possible to justify the sale for a lump sum of the chance of saving a miscellaneous cargo, a contract which would be unfair to the owners of goods which are comparatively imperishable; and that it is at all events incumbent on the master before doing so to try to induce persons to recover the cargo for salvage remuneration.

Hypothecation of cargo competent where necessary to raise money to enable the ship to proceed on her voyage.

Bound up with the first of the alternatives above-mentioned, namely, that of repairing the ship, to proceed on the voyage, is the power of hypothecating the cargo by a bottomry bond on ship, freight and cargo (*The Gratitude*, 3 C. Rob. 237; *Cargo*

<sup>1</sup> It is to be observed that if the goods are not carried on the freight is lost to the shipowner. It has been decided that, under the suing and labouring clause in a policy of insurance on freight, the whole

cost of forwarding in a substituted bottom may be recovered, although the policy contains a warranty against particular average. (*Winston v. Emp. Marine Ins. Co.*, L. R. 2 C. P. 357.)

*ex Sultan*, Swab. 511; *The Lizzie*, L. R. 2 Adm. 222; *The Karnak*, L. R. 2 C. P. 505). To make such a bond valid it must appear that the shipowners are without personal credit in the place, and that the outlay is *necessary* to enable the ship to proceed on her voyage (*The Oriental*, 7 Moo. P. C. 398, 409). These are conditions precedent of the validity even as regards the ship and freight. As regards the cargo there are the further conditions, that the money could not be raised on the ship and freight alone; that (as already shown) communication with the owners of the goods, if in reasonable expectation practicable, has been made or attempted; and that the master, acting on behalf of the owners of the goods, might reasonably expect the transaction to be beneficial to such owners; or, in other words, that the transaction was such as a prudent owner might have entered into. The effect of the bond, as regards the cargo, is to make the goods subject to payment of the bond only after the ship and freight have been realized and the proceeds exhausted.

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The effect is to make the cargo a security only on the ship and freight being exhausted.

The communication to the owners must inform them not merely of the circumstances, but of the intention to raise money by hypothecating the cargo (*The Onward*, L. R. 4 Adm. 38). The object of the communication is twofold, *first*, to give the owner an opportunity of advancing the necessary funds, or of raising them on his own personal credit, and at an ordinary rate of interest, if he can do so; and *secondly*, to give him an opportunity of unlading the cargo if he thinks it expedient (Kay, p. 564).

The communication to the owners must give notice of the intention to hypothecate the cargo.

In entering into a bond of hypothecation, so far as relates to the cargo, the master acts *quoad* the creditor, as agent for the owner of the goods under an implied authority from him; but this agency is implied in law no further than is necessary to give the bondholder a good title. As between the shipowner and the owner of the goods, the bond is that of the former alone; and by entering into it the master, as agent for the shipowner and within the scope of his presumed authority, makes with the owner of the goods an implied contract to indemnify him from the bond (*Duncan v. Benson*, *Benson v. Duncan*, 1 Ex. 557; 3 Ex. 644).

Effect of the bond as between the owners of the goods and the shipowners. Implied indemnity by the latter.

In all cases which would justify an hypothecation of the Discretion in

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similar cases to  
sell part of  
cargo.

Purchaser's  
title, by what  
law regulated.

cargo by the master, he has also a discretion to sell a part of the cargo, if by that means he can raise the money necessary to carry on the rest so as substantially to perform his contract (*The Gratitude*, 3 C. Rob. 240, 263; *Atkinson v. Stephens*, 7 Ex. 567, 576).

As regards the title of the purchaser on a sale it appears to be enough that he *bond fide* relies on a sale which is valid by the law of the place (*Cammell v. Sewell*, 3 H. & N. 617). But he does not acquire any title by reason merely that the master has sold in the *bond fide* exercise of a discretion on behalf of the owners (*Freeman v. E. I. Co.*, 5 B. & A. 621). The extent of the authority of the master is governed by the law of the flag (*Lloyd v. Guibert*, 6 B. & S. 100; *The Karnak*, L. R. 2 P. C. 505). But the proposition here stated assumes that there *is* an agency; and it is not to be supposed that the Courts of this country will apply the law of the flag so as to *create* an agency to deal with the property in goods, in circumstances which neither the law of the place to which they are consigned (being the place of final performance of the contract of affreightment as well as presumably of the domicile of the owner) nor the "general maritime law" (that is to say, the general principles of law relating to maritime contracts which English Courts are accustomed to administer), would recognise as constituting an agency at all (see p. 136 of the report of *Lloyd v. Guibert*, 6 B. & S., and the judgment of the Privy Council in *Cargo ex Hamburg* there referred to, 2 Moo. P. C. N. S. p. 289).

### 5. Partners.

A partner is a  
general agent  
for the firm.

Scope of  
authority  
inferred from  
partnership  
alone limited to  
acts necessary.

Larger author-  
ity may be  
inferred from  
course of  
business.

Every member of an ordinary partnership is its general agent; the scope of his general authority (as inferred from the mere fact of partnership) being determined by the kind of acts which are *necessary* from the nature of the business, or usually exercised by partners in carrying on similar business in the ordinary way (*Dickinson v. Valpy*, 10 B. & C. 128; *Brettel v. Williams*, 4 Ex. 623; *Stead v. Salt*, 3 Bing. 101).

A partner *may* also be a general agent for the partnership, with an authority of a different scope, inferred from the *course* of business as actually carried on with the knowledge and

sanction of *all* the partners. A general agency of this kind depends on the principles of holding out already discussed ; and not upon the mere fact of partnership.

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Further, there may be an authority, either general or special, constituted by the express terms of the partnership articles, and this may again, by the express terms, be extended beyond the scope of acts *necessary* for the business of the partnership, or usual in business of the like description.

Or express  
contract in  
partnership  
articles.

In what follows I shall, for the most part, confine myself to the general authority which is inferred from the mere fact of partnership in business of some known description.

The following powers are presumed as incident to partnerships generally :

Powers incident  
to partnership  
generally.

The partner is presumed to have power on behalf of the firm to receive money due to the firm (*Anon.*, 12 Mod. 446 ; *Duff v. E. I. Co.*, 15 Ves. 198, 213 ; *Tomlins v. Lawrence*, 3 Moo. & P. 555, 556) ; and to take the necessary steps, by action, distress, bankruptcy proceedings or otherwise, for recovering the money so due (*Whitehead v. Hughes*, 2 Cr. & M. 318 ; *Robinson v. Hofman*, 4 Bing. 562 ; *Ex parte Mitchell*, 14 Ves. 597 ; *Ex parte Hodgkinson*, 19 Ves. 291 ; *Ex parte Hall*, 17 Ves. 62).

To receive and  
recover money  
due to the firm.

This power is presumed even though the firm has been dissolved (*Phillips v. Phillips*, 3 Ha. 281 ; *Bristow v. Taylor*, 2 Stark. 50 ; *Porter v. Taylor*, 6 M. & S. 156 ; *King v. Smith*, 4 Car. & P. 108). But the presumption does not hold where there is a collusive payment in fraud of an arrangement of which the payer has notice (*Henderson v. Ward*, 2 Camp. 561). Nor is a debtor to the firm allowed to take a receipt or release from the partner in order to set off the amount against the partner's separate debt (*Piercy v. Fynney*, L. R. 12 Eq. 69 ; *Kendall v. Wood*, L. R. 6 Ex. 243).

The partner has presumed power to bind the firm by payments made in the ordinary course of business by a cheque drawn in the partnership name on the bankers of the firm and payable on demand (see *Foster v. Mackreth*, L. R. 2 Ex. 163, 166).

To pay money by  
cheques.

He has presumed power to state accounts and to promise

To state  
accounts.

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To make admissions.

to pay interest on the balance (*Fergusson v. Fyffe*, 8 Cl. & Fin. 121).

He has presumed power (even after dissolution of the partnership) to make admissions in regard to obligations contracted during the partnership so as to charge the other partners (*Wood v. Braddick*, 1 Taunt. 104; *Nicholls v. Dowding*, 1 Stark. 81; *Grant v. Jackson*, 1 Peake, 268, 269). His admission is however only *evidence* against the firm, and capable of being rebutted. For instance, where one of the firm had admitted payment of money and given a formal receipt for it the firm were permitted to show that the admission was false and a fraud on them (*Farrar v. Hutchinson*, 9 A. & E. 641). It was suggested that the plaintiffs were parties to the fraud, but that did not appear essential to the decision.

To make representations in regard to business transacted by the firm.

He has further presumed power to make representations, binding on the firm by way of warranty or of estoppel, in regard to the business transacted by the firm (*Rapp v. Latham*, 2 B. & Ald. 795; *Blair v. Bromley*, 2 Ph. 254; *Wickham v. Wickham*, 2 K. & J. 478, 490; *Sandilands v. Murch*, 2 B. & Ald. 673; see p. 497, *inf.*). He has also presumed power to modify, in the way of business, the terms of a contract entered into by all the partners for the purposes of the partnership business (*Leiden v. Lawrence*, 2 N. R. 283 Ex.).

To modify contracts in the way of business.

Notice to partner notice to the firm.

Notice to one partner is presumed to be notice to the partnership of all matters concerning the partnership business or property. This presumption arises from the probability that a partner will communicate to his co-partners that which it concerns them to know, and consequently does not apply to a fraud committed by the partner on the firm, of which he naturally would not inform them (*Bignold v. Waterhouse*, 1 M. & S. 255, 259; see also *In re Carew's Estate Act*, 31 Beav. 39, a case of director of a company; and *Brown v. Savage*, 4 Drew. 635, where a trustee who is also a beneficiary, assigning his share, is not presumed to communicate the fact to his co-trustees).

If two firms have a common partner, notice to the one in the course of business is presumed to be notice to the other (*Steel v. Smart*, L. R. 2 Eq. 84; *Worcester Corn Ex. Co.*, 3 De M. & G. 180; *Jacaud v. French*, 12 East, 317, 333). The last-men-

tioned case was put by Lord Ellenborough thus :—"If A. & B. partners, receive money to apply to a particular purpose, A. & C. in another partnership could never be permitted to contravene the receipt of it for that purpose and apply it to another."

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In partnerships which have been called *commercial* or *trading* partnerships,—a description not very exact, but which, as here used, implies that credit is essential to the carrying on of the business in the ordinary way,—the following further powers are presumed as incident to the partnership.

Powers incident to commercial partnerships.

Where the business is such that the credit ordinarily exists in the form of bills of exchange or promissory notes, every partner has an implied power in the name of the firm to draw, accept and endorse or sign such bills or promissory notes (*Re Riches*, 5 N. R. 287 ; *Pinkney v. Hall*, 1 Salk. 126 ; *Sutton v. Gregson*, 2 Peake, 150 ; *Smith v. Bailey*, 11 Mod. 401 ; *Lane v. Williams*, 2 Vern. 277, 292).

To bind the firm by bills and promissory notes.

And if the partnership is dissolved during the currency of a bill drawn by the partners payable to the order of the firm, the partnership is not dissolved as to that bill so as to recall the authority of the partners to indorse it in the name of the firm (*Lewis v. Reilly*, 1 Q. B. 349). In the case of *Yorkshire Banking Co. v. Beutson* (4 C. P. D. 204, and 5 C. P. D. 109) the question was much considered what is the presumption in the case where the name of the partnership firm is the same as that of one of the partners, and a bill is drawn and accepted or indorsed in that name. The Court of Common Pleas (Denman and Lopez, JJ.) held, in accordance with the American authorities, that in such a case the paper was *prima facie* that of the individual, and it lay on the holder to prove that the signature was in fact made, and in fact authorised to be made, as the signature of the firm. The Court of Appeal however (Bramwell, Baggallay, and Thesiger, L.JJ.) considered the view supported by the English authorities to be that (p. 121) "where a name is common to a firm and to an individual member of such firm, and the individual member carries on no business separate from the firm, there is a presumption that a bill of exchange drawn, accepted or indorsed in the common name is a bill drawn, accepted or indorsed for the partnership and for which the

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partnership is liable, and that it lies on the defendants in an action against the partners upon such bill to get rid of the *prima facie* case made against them." They however decided that in the case in point, the bills in question being accommodation bills for the benefit of the partner who signed them, and his evidence being to the effect that he did not by his signature intend to bind the firm, the presumption of their being partnership bills was rebutted. The practical result arrived at by all the judges, including Mr. Justice Lindley, who tried the case, was the same; and certainly is arrived at by the shortest road on the American theory; though perhaps that goes too far in requiring proof of the authority in fact, if the intention to bind the firm is established.

The presumed authority of a partner who signs a bill in the name of the firm is broadly distinguished from the authority of a person who signs a bill by procuration of another (whether individual or firm). He who takes a bill signed by *per procurationem* gives credit to the representation of authority therein contained and is the person to suffer if the authority was non-existent or has been exceeded (*Attwood v. Munnings*, 7 B. & C. 278).

Of course if the holder of a bill, purporting to be a partnership bill, has taken it with notice that it was drawn for an unauthorised purpose,—*e.g.*, to answer a separate debt of the partner who issued it, or to provide the capital which that partner was to bring into the business,—he cannot charge the firm upon it (*Re Riches*, *supra*, 5 N. R. 287; *Sheriff v. Willa*, 1 East, 48; *Greenslade v. Dower*, 7 B. & C. 635). The presumption on which a person dealing with the partner is *prima facie* entitled to act, is necessarily destroyed by the knowledge of such person to the contrary of the fact presumed.

Where the partnership is that of a banking or mercantile house doing business abroad, of a kind in which letters of credit are usually employed; there can be no doubt that a letter of credit signed by a partner in the name of the firm will be binding on the partners. This is what is meant by the dictum of Mansfield, C. J., in *Hope v. Cust*, cited in 1 East, 53:—"If one give a letter of credit or guarantee in the name of all the partners, it binds all." The case under consideration was that

By letters of credit abroad (when firm engaged in foreign trade).



of a bank, one partner of which in Holland, where he largely traded on his own separate account, signed in the name of the firm a letter of credit in his own favour. Lord Mansfield left the question to the jury whether the persons who took the guarantee acted fairly by the firm, or whether they had knowledge of the fraud or acted so negligently that such knowledge might be imputed to them. In effect it was presumed to be within the scope of the partner's authority to sign a letter of credit in the name of the banking firm for use abroad ; but the authority could not be relied on by a person who knew or with due care might have discovered that it was abused.

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A guarantee for the debt of another in a home transaction stands on a different footing ; for such an act cannot be regarded as necessary or as a usual mode of carrying on the business. Thus a firm of railway contractors (for a railway in this country) were held not liable on a guarantee given by one partner in the name of the firm to enable a sub-contractor to supply himself with materials (*Brettel v. Williams*, 4 Ex. 623).

But not in home business.

A partner in a commercial firm may borrow money for the partnership business (*Rothwell v. Humphries*, 1 Esp. 406 ; *Denton v. Rodie*, 3 Camp. 493), and may pledge the property of the partnership for the money so borrowed (*Ex parte Bonbonus*, 8 Ves. 840 ; *Butchart v. Dresser*, 4 De G. M. & G. 542, 544). And (according to the opinion of Mr. Lindley, 3rd ed. p. 303) he has power to create an equitable mortgage over the partnership real estate by deposit of the title deeds. And seeing that a partner has power to bind the firm by representations as to transactions within the scope of the partnership business (*Rapp v. Latham*, 2 B. & Ald. 795), I apprehend he would bind the firm for money borrowed which he represented to be required for the purposes of the firm, though in truth it was not.

To borrow money for the partnership business.

But where a transaction is out of the usual course of business, and there was no fair ground for believing that the money was wanted for the purposes of the business, the firm was not bound (*Lloyd v. Freshfield*, 2 C. & P. 325, 333). The authority to borrow for the firm does not of course extend to borrowing money for the purpose of supplying the capital to be put by the partner into the business ; and the person who advances money

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To purchase  
for the firm and  
to sell partner-  
ship goods.

to a partner for this purpose cannot charge the firm with it (*Fisher v. Taylor*, 2 Ha. 287). Nor as above seen will such a lender be in any better position by taking for the money so lent a bill of exchange accepted by the partner in the name of the firm (*Greenslade v. Dower*, 7 B. & C. 635).

A partner in a commercial firm has presumed authority to purchase for the firm all things of the kind usually dealt in by them (*Bond v. Gibson*, 1 Camp. 185; *Gardiner v. Child*, 8 Car. & P. 345; cf. *Wilson v. Whitehead*, 10 M. & W. 503); and he has power to sell the property of the firm in the usual way of business (*Fox v. Hanbury*, Cowp. 445; *Barton v. Williams*, 5 B. & Ald. 395, *per Best*, C.J., 405). And this extends to the realization of the property for winding up the concern after dissolution (*Butchart v. Dresser*, 10 Ha. 453, 4 D. M. & G. 542). And although, where there is merely a partnership in a particular venture, there is not necessarily a presumption of authority in one of the partners to dispose of the goods (*Barton v. Williams*, *supra*); if the venture is left to the management of one who is to purchase in his own name, the others being in effect sleeping partners, the managing partner has presumed authority to act throughout and to deal with the goods as a partner on behalf of the firm by sale, pledge or otherwise (*Reid v. Hollinshead*, 4 B. & C. 867; *Ex parte Gellar*, 1 Rose, 297).

Particular kinds  
of business  
where powers  
are more  
restricted.  
Mining  
companies.

Where the business of the firm is such that the outgoings are usually provided for by cash payments or book credits, as in the case of a mining company on the cost-book principle, there is no power presumed to draw or accept bills (*Dickinson v. Valpy* (10 B. & C. 128); *Ricketts v. Bennett* (4 C. B. 686); *Brown v. Byers* (16 M. & W. 252); compare *Brown v. Kidger* (3 H. & N. 253, where the business was a coal-mine, and the power was held to be implied by the deed of partnership). Nor is there in such a business any implied power to borrow money (*Hawtayne v. Bourne*, 7 M. & W. 595; *Brown v. Byers*, *supra*); although there may be a good claim to indemnity by way of salvage in favour of a partner who has spent his own money to preserve the concern from ruin (*Ex parte Chippendale*, 4 De G. M. & G. 19).

The business of attorneys has been frequently distinguished from that of a commercial firm (*Hedley v. Bambridge*, 3 Q. B. 316; *Levy v. Pyne*, Car. & Marsh. 453, 454); so that in such a partnership there is no presumed authority in a partner to sign a promissory note or indorse a bill of exchange in the name of the firm (*Foster v. Mackreth*, L. R. 2 Ex. 16). A firm of attorneys do not, as such, act as scriveners; and without evidence that they have usually so acted, one partner has no authority in the name of the firm, to receive money to be invested, generally, on security. But to receive money to be invested upon a particular mortgage may be incidental to their business as attorneys (*Harman v. Johnson*, 2 E. & B. 61).

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Attorneys or  
solicitors.

Distinguished  
from scriveners.

A firm of attorneys have been held not liable on a guarantee given by one of them in the name of the firm, in order to discharge a client from custody (*Hasleham v. Young*, 5 Q. B. 833).

A distinction must however be made between guarantee as a substantive contract, and a guarantee which is merely incident to a business transaction undertaken by the firm. A guarantee of this sort is indeed hardly distinguishable from a *representation*, in regard to the business transacted by the firm. In *Sandilands v. Murch* (2 B. & A. 673), it is said by Abbott, C.J. (p. 678), "the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners." The case in point was this:—A firm of navy agents, beyond the ordinary scope of their business, had undertaken to lay out the plaintiff's money, received through them, in the purchase of an annuity. The purchase having been (as was held to be proved) in fact authorised by the other partners, the authority to guarantee the annuity so purchased was presumed as an incident to the purchase. It may at least be safely inferred as a general principle that if a partnership firm undertake to handle and deal with another person's money at their discretion, any assurance given by a partner with regard to that money is presumed to be made with the authority of the firm. This would doubtless apply to a firm acting as scriveners, though not to solicitors acting strictly as such.

Implied power  
of guarantee  
incident to  
business  
specially under-  
taken by a firm  
of agents  
receiving money.

In a partnership at will, a partner has no presumed authority Acts which a

K K.

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§ 2.

partner has,  
generally, no  
implied power  
to do.  
Lease.

Submission.

Deed.

Agents of  
commercial  
companies and  
corporations.

As distinguished  
from partner-  
ships.

on behalf of the firm to grant a lease of the partnership property (*Sharp v. Milligan*, 22 Beav. 606). Where however partners, or any joint tenants, are lessors, notice to quit by one on behalf of all is good (*Doe v. Hulme*, 2 Man. & Ry. 433; *Doe v. Summersett*, 1 B. & Ad. 135; cf. *Goodtitle v. Woodward*, 3 B. & Ad. 689; *Right v. Cuthill*, 5 East, 491).

There is no presumption of an authority to a partner on behalf of the firm to submit to an arbitration (*Stead v. Salt*, 3 Bing. 101; *Adams v. Bankhart*, 1 Cr. M. & R. 681; *Hutton v. Royle*, 3 H. & N. 500). Nor is a partner who is not served with process in an action presumed to give any authority to his co-partners so as to bind him by a consent order made in the action (*Hambridge v. De la Crouée*, 3 C. B. 742).

There is also, generally speaking, no presumed authority to a partner to bind the partnership by deed (*Harrison v. Jackson*, 7 T. R. 207; *Steiglitz v. Eggington*, Holt, N. P. 141). A release stands on a different footing, because a debtor of the firm may lawfully pay his debt to one of the partners, and ought therefore to be able to get a discharge upon payment (*Stead v. Salt*, 3 Bing. 101, 103). The same result has been arrived at on the technical ground that a release by one of joint creditors barred the right of joint action; and, the action being technically barred at law, there was no equity unless the release was proved to be a fraud (*Hawkshaw v. Parkins*, 2 Swanst. 539; *Furnival v. Weston*, 7 Moo. 256; *Arton v. Booth*, 4 Moo. 192; *Jones v. Herbert*, 7 Taunt. 421; *Barker v. Richardson*, 1 Y. & J. 362).

In considering partners as agents for the firm I have hitherto confined myself to the principles relating to ordinary partnerships. I shall now state briefly how these principles are modified in regard to large companies and corporations.

It has been seen that in an ordinary partnership, every member is a general agent for the firm. This is the rule established upon the ordinary presumptions of commercial business; but it fails to apply to those larger associations where, owing to the great number of partners the transaction of business is necessarily, and notoriously, intrusted to a few directors or managers, the other members taking no part in

(Lindley, 3rd ed. p. 250). This was the case in regard to the species of joint stock companies (now merged and extinct) constituted under the Act of 1856; and is the case in cost-book mining companies (now regulated by the Stannaries Act, 1869, 32 & 33 Vict. c. 19); in Banking Companies governed by 7 Geo. IV. c. 46; in companies formed by letters patent under the Act of 7 W. IV. & 1 Vict. c. 73; and in friendly, building and industrial and provident societies such as may be registered under the Acts 25 & 26 Vict. c. 37, and 30 & 31 Vict. c. 117.

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Companies not  
incorporated.

Where persons are associated not into a partnership, but (under Charter or Act of Parliament) into a *Corporation*, there is not and never has been any presumption that an individual member of the associated body *is as such* the agent of the corporation for any purpose. The associated body is, by the fiction or intendment of law, a person distinct from the aggregate of the individual members; and the entity so constituted acts either by the solemnity of a deed under its common seal, or by directors or other agents authorised by the express constitution or by notorious usage of the body corporate.

Incorporated.

Of corporations there are two kinds with which a mercantile lawyer is especially concerned; and which I may here designate by the common name of *commercial corporations*.

Commercial  
corporations.

The *first* kind are companies incorporated by the general Act known as "The Companies Act, 1862," and regulated by that and the later Acts of 1867 and 1877. These now cover the whole ground formerly occupied by various extinct species of joint stock companies.

Companies  
incorporated by  
general Act.

The *second* kind are the companies incorporated for various undertakings of a public nature (such as railways) under special Acts of Parliament, or under departmental order having by express enactment of the Legislature the force of a special Act. In some of the older incorporated companies of this kind, the whole of the original constitution is set forth in the Special Act. In all those more recently formed, the Special Act incorporates by reference one of the general Companies Clauses Consolidation Acts (8 & 9 Vict. c. 16, or for Scotland 8 & 9 Vict. c. 17).

By Special Act.

The incorporated companies which, by way of distinction from other corporations, I have called *commercial corporations*, have

Modern Acts  
incorporating  
commercial

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§ 2.

companies  
contain express  
enactments as to  
the liability of  
members.

this feature in common; namely, that the Acts under which they are constituted contain express provisions for establishing and enforcing a *liability* (limited or unlimited as the case may be) *on the part of individual members*, to contribute to the capital, or for the liabilities, of the *Company*. It is apprehended that but for the enactments creating (either expressly or by necessary implication) this liability on the part of members, the recourse of creditors of a *corporation* would be, in effect, restricted to the corporate funds.

Commercial  
corporations can  
only act within  
the scope of the  
objects for which  
they are  
incorporated.

It is the rule without exception in regard to commercial corporations, that they exist for certain defined purposes only, and that any acts purporting to be done by the corporation contrary to or outside the scope of those purposes, are essentially void; nor are such acts capable of being ratified or given effect to even by the unanimous consent of all the individual members of the corporation.

*Ashbury, &c.,  
Co. v. Riche.*  
As defined by  
the special Act.

This rule was conclusively established in the case of *Ashbury, &c., Co. v. Riche* (L. R. 7 H. L. 653); from which it appears that the rule applies equally to companies incorporated by the general Act of 1862, and to those incorporated by special Act; the only difference being, that in the latter case the scope of the purposes is defined by the special Act and the incorporated Acts; and in the former it is determined (as by a law of the Medes and Persians) by the memorandum of association.

Or by the  
memorandum of  
association.

In considering, therefore, whether an agent of an incorporated company can bind the company in a particular transaction, it is first necessary to consider whether the transaction is within the scope of the objects for which the company is incorporated.

It is not within the scope of this treatise to discuss in detail the kind of Acts which have been ruled to be outside the objects of particular companies. I may say, by way of example, that a company incorporated to make, maintain, and work a specific railway cannot without further and special powers employ its capital upon a different railway (*Bagshaw v. E. U. Ry. Co.*, 7 Hare, 114); nor make a harbour (*Caledonian, &c., Ry. Co. v. Mayor of Helensburgh*, 2 Macq. 391); nor guarantee the undertaking of a steamboat company (*Coleman v. E. C. Ry. Co.*, 10 Beav. 1); nor enter into a transaction involving a general

delegation of its statutory powers to another company (*Beman v. Rufford*, 1 Sim. (N. S.) 550; cf. *Midland Ry. Co. v. G. W. Ry. Co.*, L. R. 8 Ch. 841). Further a company expressly empowered to purchase lands within certain limits cannot purchase lands outside those limits; though it is not unlawful for such a company to make an agreement for the purchase of lands conditionally on statutory powers for that purpose being afterwards given (*E. C. Ry. Co. v. Hawkes*, 5 H. L. Ca. 331, 348). And a company expressly empowered by statute to borrow money by the issue, on certain conditions, of securities of a particular description, cannot validly bind itself for borrowed money by instruments of a totally different description (*Chambers v. Manchester and Milford Ry. Co.*, 5 B. & S. 588). The company and their directors may be restrained on the application by any shareholder (on behalf of himself and others objecting), or by the Attorney-General on behalf of the public (at least if there is a case of public mischief, see *Att.-Gen. v. G. E. Ry. Co.*, 11 Ch. D. 449, 479, 499, 501) from acts which are beyond the scope of their proper objects; and no agreement so far as it contemplates such acts can be binding on the company. For information at large upon these subjects the reader is referred to Mr. Seward Brice's elaborate treatise on the subject of *ultra vires*.

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Within the scope of the objects for which it is constituted, a commercial corporation usually acts by a select body of the shareholders styled directors; and these may, where such employment is necessary for the carrying on of the business, employ sub-agents under them.

Commercial corporations usually act by agents styled directors.

By the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), which now applies to most English companies incorporated by special Act, the directors (sec. 90) may, with certain exceptions, such as (sec. 91) the election of directors and certain financial matters which must be transacted at general meetings of the shareholders, exercise all the powers of the company; but their powers may, as to future exercise, be controlled by the vote of a general meeting of shareholders specially convened for the purpose.

Powers of directors under the C. C. C. Act, 1845.

When subject to control of general meeting of shareholders.

By a standing order of the House of Lords, the sanction of a

Wharnccliffe meeting.

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general meeting convened in a prescribed manner, and commonly called the "Wharnccliffe meeting" from the author of the order, is required before the introduction into the House of Lords of a bill to enable a company, already incorporated by special Act, to extend, or to abandon (in whole or in part) their undertaking.

Subject to the modifications above mentioned, it may be said, generally, that the powers of the directors of a commercial company incorporated by special Act, are co-extensive with the powers of the company itself.

Directors of  
companies under  
general Com-  
panies Acts.

The powers of directors of companies under the General Companies Acts are prescribed by the articles of association; those given by the typical articles in Table A scheduled to the Act of 1862 being somewhat similar to those under the Companies Clauses Consolidation Act. It may be stated generally that for administrative purposes their powers are co-extensive with the powers of the company. It has been decided by the Master of the Rolls that where the articles provide "that the business of the company shall be conducted by not less than" a specified number of the directors, the words are imperative, not merely directory; and that a call made or forfeiture of shares declared by less than the specified number, is invalid (*Bottomley's case, In re Alma Spinning Co.*, 16 Ch. D. 681).

Why seal  
usually imma-  
terial in contracts  
of commercial  
corporations.

The extensive powers expressly given to directors would be generally sufficient, in regard to commercial corporations, to dispose of any technical objection to the validity of a contract for want of the common seal of the company. This is pointed out by the judgment of Bovill, C.J., in *South of Ireland Colliery Co. v. Waddle* (L. R. 3 C. P. 463, 468, 471). But the *ratio decidendi* of this and the other cases in which such objections have been overruled, has been rested on broader grounds, and, to use the words of C.B. Pollock in *Australian Royal Mail, &c., Co. v. Marzetti* (11 Ex. 228, 234), cited with approval by Bovill, C.J., in *South of Ireland, &c., Co.* (L. R. 3 C. P. 471), "it is now perfectly established by a series of authorities that a corporation may with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience and is in accordance with common sense." The authorities, besides those above



quoted, are *Henderson v. Australian Royal Mail, &c., Co.* (5 E. & B. 409); *Reuter v. E. Tel. Co.* (6 E. & B. 341); and the unanimous judgment of the Exchequer Chamber in the above case of *South of Ireland, &c., Co. v. Waddle* (L. R. 4 C. P. 617). The principle is confirmed by the universal *consensus* of practice, in such important matters (for instance) as the contracts of railway companies with landowners which are usually made and signed by the surveyor employed by the company as agent on the company's behalf. In the numerous actions or suits which have been brought against embarrassed railway companies upon such contracts, no one ever heard of an objection that the contract was not under the seal of the company.

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By way of contrast, and to illustrate the strictness required in regard to corporations whose primary objects do not involve the making of contracts with regard to property, I cite here the case of *Mayor of Kidderminster v. Hardwick* (L. R. 9 Ex. 13), where an agreement to take certain tolls not under seal of the corporation was held not binding. As an instance of the contrary where the agreement has been acted upon, I refer to *Crook v. Corporation of Seaford* (L. R. 6 Ch. 551; see also *Melbourne Banking Corporation v. Brougham*, 4 App. Ca. 156, 169).

Without entering at large into the duties of directors towards the company which they represent, it may be observed generally that they are, as agents for the company, at least bound to act faithfully in the company's interests (*Hay's case*, L. R. 10 Ch. 593), and to account to the company for any profits made by them on account of business transacted by them for the company; and, moreover, if a director, acting for himself, proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company (*Imperial Mercl. Assn. v. Coleman*, L. R. 6 H. L. 189).

Duties of  
directors to  
company.

Accountable for  
profits, secret or  
otherwise, made  
by them in  
company's  
business.

In *Parker v. McKenna* (L. R. 10 Ch. 96), directors were made accountable to the company (a joint-stock bank) for profits made by them upon new shares bought by them at a certain price from a person who was under contract to take or place them at that price; it being, as the Court held, the duty of the directors as agents for the bank, to watch their interests

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in the fulfilment and execution of the contract. The principle applicable to the case was thus stated by Lord Cairns on the appeal in *Chancery* (L. R. 10 Ch. 118) :—"Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. If *Stock* had bought these shares and paid for them, and become the absolute owner of them, the directors were as free as any person in the market to go to *Stock* and to become the purchasers from him of those shares. The agency in that case would have been over, and there would have been no longer any conflict between interest and duty. Here the agency had not terminated. The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal."

Summary  
remedy  
against directors  
in winding up,  
for misfeasance,  
&c.

A summary means of enforcing against directors, in a winding up, their liability for misfeasance or misapplication of the company's property, is provided by the 165th section of the Companies Act, 1862.

As instances of the enforcement of their liability under this section I shall cite a few of the more recent cases.

In *Pearson's case* (4 Ch. D. 222) a director was ordered under this section to pay up the amount of his qualification shares.

In *Re Crenver and Wheal Abraham, &c., Mining Co., Ex parte Wilson* (L. R. 8 Ch. 45), a director was held bound to pay, as loss occasioned to the company by his breach of duty as a director, the amount of the calls on shares which he had allowed to be allotted to his own infant children who had, at his instance, applied for the shares.

In *Re Englefield Colliery Co.* (8 Ch. D. 388), directors were held jointly and severally liable to repay to the company a sum of £3500 paid by them out of the funds of the company to

a promoter with whom they had before the formation of the company agreed that this sum should be paid to him for "preliminary expenses." The ground taken by the Court of Appeal was that these directors by making such an agreement had disqualified themselves from exercising an independent judgment as to the propriety of the payment (see also *McKay's case*, 2 Ch. D. 1.)

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In *Re National Funds Assurance Co.* (10 Ch. D. 118), directors who had paid dividends out of capital (no profits ever having been earned by the company) were, under this section, held liable to refund the dividends, without prejudice to their right to recover from each shareholder the amount of capital he had received. There was a clause in the articles that the directors might, "without the sanction of a general meeting, pay interest at the rate of five per cent. upon the paid up capital." The Master of the Rolls considered that this clause did not sanction payment of dividends out of capital, and that the creditors were entitled to have this fund kept for payment of their claims.

Whether the acts of promoters of a company before incorporation can in any case bind the corporation is a question which has received a good deal of discussion.

Promoters of companies. Can an incorporated company be bound by acts of promoters?

In regard to companies incorporated by Special Act the question has arisen in a number of cases out of agreements made with opponents pending the application to Parliament.

There is nothing illegal in such agreements, if not made with members of the Legislature to purchase their support in that capacity; nor (as already seen, p. 501, *supra*), is it *ultra vires* of a company already incorporated, pending an application for the extension of its powers, to buy off the opposition of a landowner by agreeing, conditionally upon the Act passing, to take his land upon certain terms (*Scottish N.-E. Ry. Co. v. Stewart*, 3 Macq. 382, 408, 416). An agreement such as that last referred to may be enforced against the company even if they should not make the line requiring the taking of the land (*Taylor v. Chichester, &c., Ry. Co.*, L. R. 4 H. L. 629).

But a different question arises where the agreement is made by individuals engaged in promoting a Bill in Parliament which

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on becoming an Act incorporates those persons and others who may become associated with them into a company. There are decisions of Lord Cottenham to the effect that the incorporated company is, as a general assignee or successor to the promoters, responsible for their engagements. Of these the leading decision was *Edwards v. Grand Junction Ry. Co.* (1 My. & Cr. 65). These decisions have been questioned, and the contrary view,—namely that the act of the Legislature by incorporating all persons willing to subscribe to the undertaking upon certain terms, becomes the charter of the company prescribing and defining its rights and liabilities—strongly maintained by Lord Cranworth in the cases before the House of Lords of *Caledonian, &c., Ry. Co. v. Mayor of Helensburgh* (2 Macq. 391, 405), and *Preston v. Liverpool, &c., Ry.* (5 H. L. C. 605, 617). Not to mention that the judgment of Lord Cranworth in the latter case was entirely assented to by Lord Brougham, his reasoning is supported by the weighty authority of Vice-Chancellor Kindersley in *Earl of Shrewsbury v. N. Staffordshire Ry. Co.* (L. R. 1 Eq. 593, 615, 616), who also mentions the doubts expressed as to Lord Cottenham's decisions by Lord Campbell<sup>1</sup> and Lord Romilly. V.-C. Kindersley's judgment (p. 618) however concedes it to be an open question whether Lord Cottenham's decisions are still to be considered authority for the qualified proposition that the contracts of the promoters are binding on the company *provided* that what is contracted to be done by the company is not *ultra vires*. But he limited the practical effect of that concession by deciding that it was not within the

<sup>1</sup> The "doubts" of Lord Campbell here referred to are contained in his judgment in *Eastern Counties Ry. Co. v. Hawkes* (5 H. L. C. 356). "I think it right," he says, "to guard myself against the peril of being supposed to acquiesce in the doctrine contended for by the respondent's counsel, that there is a complete identity between the promoters of the Act and the company, and that as soon as the Act had received the Royal Assent, a bill in equity might be filed against the company for specific

performance of any contracts respecting land into which the promoters had entered. *If the company should adopt the contract, and have the full benefit of it, I think the company would be bound by it in equity, and therefore I approve of the decision in Edwards v. Grand Junction Ry. Co., although the language of Lord Cottenham in that case may require qualification and must be taken in reference to the facts with which he was dealing.*"

power of a company to bargain for giving away £20,000 to a landowner for no other consideration than his countenance and support to their Bill in Parliament.

The question seems narrowed to this. If promoters of a company not yet incorporated, in order to buy off opposition of a person having a *locus standi* to oppose agree that the company shall only interfere with the right of such person upon certain conditions, can the company use its statutory powers so to interfere, without carrying out the conditions? Upon this point, Mr. Lindley (3rd ed. p. 414) says that the *decision of Edwards v. The Grand Junction Ry. Co.* is not overruled, and that it may, as regards contracts which are *intra vires* of the company, still be regarded as unimpeached. The doctrine, to be consistent with the actual decisions, is put in this way; that a Court of Equity will not permit the company to use their powers under the Act, in opposition to the arrangements (being *intra vires* of the company) made with the promoters prior to the act on the faith of which they were permitted to obtain such powers.

Put in this way the doctrine seems to amount to this, that a Court of Equity will, although a Court of law would not, assume a jurisdiction to control the effect of the act of incorporation by the Legislature. I am bound to say that, on full consideration of the authorities and the reasons adduced, I think Lord Cottenham's decisions must now be considered overruled and obsolete. It is not only that the number and weight of the authorities above cited must be set against the single authority of Lord Cottenham; but the reasons given by Lord Cranworth must be considered against those of Lord Cottenham upon their intrinsic weight: and it is further to be observed that the reasons which Lord Cranworth admits for hesitation in overruling those decisions at a time when, standing unquestioned, they might have been relied on in practice, can hardly be of weight many years after they have been impeached on so high authority. Add to this that amongst the numerous *dicta* to the effect that Lord Cottenham's decisions may be binding as *authorities*, not a word of argument<sup>1</sup> has been adduced in support of his reasons

<sup>1</sup> I do not consider it an exception to this that Mr. Lindley quotes Lord Cottenham's reasons at length. For while observing that the doc-

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nor has any attempt been made to answer Lord Cranworth's reasons to the contrary.

In regard to companies incorporated under the Act of 1862, it is clear on authority as well as on principle, that the company so incorporated cannot be bound by the acts or engagements of promoters done or made before the company came into existence (*In re Empress Engineering Company*, 16 Ch. D. 125, and see p. 397, *ante*).

Promoters are agents as between themselves and the company, so as to be bound to refund secret profits.

As between themselves and the company to be formed, promoters are considered to be in a fiduciary relation similar to that of an agent to a principal. And consequently a promoter is liable to refund to the company any profit for which he has bargained on his own behalf with a person who, through his intervention, has made a contract with the company (*Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918).

The subject of promoters will be further considered in the concluding part of this book in regard to questions relating to the rescission of a contract on the ground of fraud. In the meantime it may be observed that the question what is a promoter does not admit of any short and clear definition. It is gathered from a course of conduct which will be found described in the circumstances of the cases, which are necessarily complicated where there is a question of secret profits. Perhaps the nearest approach to a short test of promotership in the persons who negotiated a sale is that put by V.-C. Bacon in *Bagnall v. Carlton*, 6 Ch. D. 382:—"The sale and the formation of a company formed one complete entire idea." Lord Justice Cotton in the same case (p. 407) puts the case thus:—"When

trine limited in the way above mentioned, is not impeached, he does not express any approval of it on principle. Nor can I admit as an exception the passage above quoted (p. 506, note, *ante*) from Lord Campbell's judgment in *Hawkes v. E. C. Ry. Co.* There is a *non sequitur* in the argument as

reported, which makes it unintelligible. "*If the company should adopt the contract*" (the contract being *intra vires*) *cadet questio*. But this has nothing to do with the facts, any more than with the *ratio decidendi* of *Edwards v. Grand Junction Ry. Co.*

once persons, who have got a contract for a company intended to be formed, do put forward to the public an option to join in the company, and to take the purchase, then from the very time when the contract is entered into they make themselves trustees for the company, and are, as regards obtaining any secret profits to themselves, in the same position as if the company was existing at the time when the contract was entered into." Where the purchase in the first instance is a really independent transaction although by persons who afterwards entertain and carry out a proposal for getting up a company, those persons are not accountable to the company for the difference of price (*Chesterfield & Co. v. Black*, 26 W. R. 207; *In re British Seamless Paper Box Co.*, 17 Ch. D. 467). The question as to whether they have so acted towards the company subsequently formed as to be able to *maintain their bargain* with the company is one which will be discussed further on (see p. 516, *et seq.*, *post*).

It has been held that in estimating the amount of the secret profit to be refunded by a promoter, he is entitled to be allowed all sums *bond fide* expended in securing the services of the directors and providing their qualification, and in payments to the brokers and officers of the company and to the public press in relation to the company (*Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918).

## PART IX.

### ON FRAUD AND BREACH OF CONFIDENTIAL DUTY.

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IN a former place I pointed out the distinction between consent induced by fraud, and the apparent consent which is induced under constraint of force or fear; and I reserved consideration of questions of fraud for reasons which I shall now state.

The principles of law relating to fraud apply for the most part to all contracts and conveyances equally with sales, and will be conveniently discussed apart from the special matter relating to sale. They also involve matter specially relating to agency; and this it was convenient to postpone until the subject of agency, so far as not affected by fraud, had been dealt with. It is now possible to consider these principles having regard generally to their bearing upon commercial transactions, and especially those involving the relation of principal and agent.

Acts induced by  
fraud.  
Definition.

When a person, with intent to influence the conduct of another, wilfully leads him into a false belief, and the latter acts accordingly to his hurt, the act is said to have been induced by fraud.

It is the same thing whether the representation is made by express statements, or by acts which are intended to convey, and do in fact convey, the belief.

The positive statement recklessly made by a person of what he does not know to be true, if it turns out untrue in fact, has precisely the same effect as a statement which he knows to be false (*Peek v. Gurney, per Lord Colonsay, L. R. 6 H. L. 400*).

Liability for  
fraud distin-  
guished from  
liability under

I must here distinguish a kind of liability which is apt to be confused with the liability grounded on fraud but which really depends on entirely different considerations. Where a state-



ment is made under such circumstances that an invitation to act on the statement is inferred, the person who does act accordingly is entitled to hold the person making the statement liable as *warranting* its correctness. The word *invitation* is here used, exactly as in the familiar class of cases which I have discussed in "The Law of Negligence" (2nd ed. p. 61, *et seq.*), to imply that the statement is made *as a matter of business* in which the person receiving the information is interested, as well as in the expectation that he will act on the information. The principle here referred to is the ordinary principle of representation already discussed at p. 34, *et seq.*, *ante*; and as further illustrations of it, I here cite the cases of *Burrows v. Lock*, 10 Ves. 470, and *Williams v. Swansea Harbour Masters*, 14 C. B. N. S. 845. The ground of liability differs from fraud in this, that the knowledge by the person who makes the statement that it is false, or even his reckless disregard of truth in making the statement, is immaterial. Where there is fraud, all the elements are present which constitute the ground of liability here spoken of, and the *wilful falsehood* or *intention to deceive* as well.

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representation accompanied by invitation to act.

The legal consequences of fraud are twofold :—

Legal consequences of fraud.

1. Subject to any rights of innocent persons which may have supervened, and to the condition that the person deceived can and does restore matters substantially to their former position ; —the act is voidable at the option of the deceived person.

It follows that, if the matter has remained in *contract unexecuted*, the contract cannot be enforced against the person who has been deceived, and who has not, after knowledge of the deception, ratified the contract.

2. The deceived person is entitled, *as against the person guilty of the fraud*, to compensation for the damage sustained by him in consequence.

Before further considering these consequences I shall advert to certain classes of acts, not exactly coming under the above definition, but having the same effect so far as relates to making the contract voidable ; and I must here observe that the word "fraud" is sometimes conveniently used in the wide sense of embracing all the acts which have this effect.

Acts, not within the above definition, but having the same effect so far as relates to making the contract voidable.

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Taking advantage  
of drunkenness  
or lunacy.

Where a person induces another, who is too drunk to know what he is about, to sign a contract to his prejudice, it has been held that the contract is voidable and not void (*Matthews v. Baxter*, L. R. 8 Ex. 132), a decision in accordance with that in *Molton v. Camroux* (2 Ex. 487, 4 Ex. 17) as to the contracts of a lunatic. It would not be worth while to pursue the question whether there is, in such a case, any true consent or not. The decisions rest not upon any analysis of this kind, but upon grounds of general convenience, and the result is to afford protection to the persons incapacitated, without disturbing rights acquired by *bond fide* dealings.

There are other cases, where acts, not amounting to positive deception, have all the consequences of fraud; but before describing these I must advert to the duties of contracting parties generally as to imparting information.

In ordinary  
cases of bargain  
no obligation  
of disclosure.

In the ordinary case of contracting parties, one of the parties is not bound to disclose to the other a fact of which he knows the other to be ignorant, although he knows that the knowledge would materially influence the conduct of the other. To take the case put by Lord Thurlow in *Fox v. Macreth* (2 Cox, 321), *A.*, knowing there to be a mine on the estate of *B.*, of which he knows *B.* to be ignorant, enters into a contract to purchase the estate for a price not taking into consideration the value of the mine. Such a contract (Lord Thurlow says) would not be set aside by a Court of Equity.

The correctness of this illustration is sanctioned by Lord Eldon in *Turner v. Harvey* (Jacob, p. 169, 178). But Lord Eldon observed that the buyer in such a case is not entitled to drop a misleading word, and illustrated the observation by his decision of the case in point. This observation is also well illustrated by the case of *Jones v. Franklin* (2 Mood. & R. 348), *coram Rolfe, B.*, at *nisi prius*, referred to by Mr. Benjamin, 2nd ed., p. 357. It was a purchase of a policy of life assurance from the assignees of a bankrupt. The buyer, having private knowledge that the assured was dangerously ill, had sent an agent (who also knew this) to negotiate a purchase of the policy. The agent, in answer to a question, stated his *opinion* that the policy was worth about sixty guineas. The purchase was made

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and the assured died within two days. Rolfe, B., told the jury that, if they believed these facts, the defendant's conduct amounted to legal fraud. This was clearly right, because the *opinion* given in such a matter *implied a representation* (which was false) that the agent *knew* of no *fact* seriously affecting the value of the life.

On this view the case seems to me (though Mr. Benjamin suggests it is not) consistent with *Vernon v. Keys* (12 East, 632, 4 Taunt. 488). There the defendant had, falsely as it appears, alleged as a reason for giving only a certain price, that other persons interested along with him refused to go higher. There was no misrepresentation affecting the intrinsic value of the thing: and the gist of the decision is simply that parties to a bargain are not to be charged with their own statements made by way of haggling, or presumed to rely upon the haggling statements of the other. A circumstance urged to show the falsehood of the statement in the particular case was that the defendant had charged his partners with the higher price to which they had been willing to go. This was indeed an indication of fraud. But the fraud was against the partners who could doubtless have claimed the benefit of the lower price, and gave no ground of relief to the vendor with whom the defendant was in no fiduciary relation.

The duty of a vendor where the buyer is under a self-imposed mistake as to the nature of what he is buying is discussed in *Smith v. Hughes* (L. R. 6 Q. B. 597). The case arose out of a sale by sample of oats which the buyer believed to be old oats and bought on that assumption. Cockburn, C.J., said (p. 603), "I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. . . . Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his

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deception. He has himself to blame. The question is not what a man of scrupulous or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding." Blackburn, J., said, "I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him; and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a Court of morals there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

But in certain cases there is a duty to make disclosure; and the omission to do so has the effect of fraud, so far as relates to making the transaction voidable.

But in certain cases there is a *duty* on one of the parties to disclose all material facts, and in such cases the *mere omission* to disclose, without any active concealment, has in contemplation of law, the effect of fraud, so far as relates to making the transaction voidable.

Of such cases there are two distinct classes:—

1st. Cases in which one of the parties is agent or guardian or in some other fiduciary relation to the other:

2nd. In contracts of insurance.

Fiduciary relation.

As an illustration of cases of the first class I will state that of *Tate v. Williamson* (L. R. 2 Ch. 55).

*Tate v. Williamson.*

T., a young man of twenty-three, being much pressed for payment of college debts amounting to about £1000, and being at the time estranged from his father, wrote to his great-uncle for advice and assistance as to payment of his debts. The great-uncle deputed his nephew W. to see T. about the matter and

arrange for payment of the debts. W., at this interview, suggested to T. an offer of composition, a proposal which T. declined to entertain. T. however mentioned that he was willing to sell his moiety of a certain freehold estate, and after some conversation as to value, W. consented to buy this from him for £7000 payable by instalments. W. however pressed T., before concluding a binding agreement, to consult his friends about the matter, and an independent solicitor was employed on T.'s behalf. W., meantime, on his own account, consulted a mining engineer who valued the mines under the lands at £20,000, but this W. did not communicate to T. The purchase-money was to be advanced to W. by his uncle as a gift.

Shortly afterwards T. died of *delirium tremens*. His executors filed a bill in Chancery to have the sale of the estate set aside. It was held that under the circumstances, W. was placed in a fiduciary relation towards T. which made it his duty to communicate to T. all material information which he acquired affecting the value of the property, and that as he had not communicated the valuation as to the mines, the transaction must be set aside.

It is not the fiduciary relation by itself which upsets the transaction ; but the unfairness of the bargain having regard to that relation, or the non-disclosure of a fact which the person in that relation is considered bound to disclose. The fiduciary relation imposes upon the person in whom the trust is reposed not only the duty to make disclosure of every material circumstance which he knows and to take care that the bargain is in every respect fair, but also the burden of proving, at any time afterwards, that nothing was concealed and that the transaction was in itself fair. If he does prove this the transaction will stand good, although an unexpected benefit may have accrued to the purchaser (*O'Rourke v. Bolingbroke*, H. L., on appeal from Ireland, 30 July, 1878, 26 W. R. 239). So it is possible that a purchase by a solicitor from his client might stand good if openly done and no advantage taken ; although it is certain that a purchase by a solicitor of the client's property, without disclosing the fact that the solicitor is the real purchaser cannot possibly stand (*Macpherson v. Watt*, 3 App. Ca. 254). Any

It is the undue advantage taken which upsets the transaction ; not the fiduciary relation alone.

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surreptitious dealing between the principal on the one side and the agent of the other principal, will give the latter sufficient ground to rescind the contract (*Panama, &c. Co. v. India Rubber, &c. Co.*, L. R. 10 Ch. 515; *Smith v. Sorby*, 3 Q. B. D. 522).

Unless the transaction is in itself a breach of the fiduciary relation.

There are indeed cases in which the fiduciary relation alone is sufficient to make a transaction voidable. This is where the transaction is from its nature necessarily a breach of the confidence reposed. For instance, where a person, in a fiduciary capacity, undertakes the sale of property, he must not, however fair the bargain might otherwise be, become the buyer on his own account. This point has been already mentioned in regard to brokers for sale (p. 425, *ante*; *Ex parte Dyster*, 2 Rose, 349; *Rothschild v. Brookman*, 5 Bli. N. S. 165); and the same principles apply to a trustee charged with a duty or exercising a power of sale, and probably to a director of a company in whom is vested and by whom exercised jointly with his co-directors the powers of the company to deal with the company's property.

Promoters of companies are in a fiduciary relation to the companies formed by them.

A class of persons who have been fixed, by recent decision, to be within the *fiduciary relation*, are *promoters* of companies. The expression is well understood, and—altogether apart from the questionable transactions with which it is sometimes associated—implies that the persons so described have that influence in the original constitution and early proceedings of the company, which naturally belongs to the initiative in an unorganised convention of subscribers.

New Sombrero Phosphate Company.

The proposition that promoters stand in a *fiduciary relation* to the company which is created by their initiative, is concurred in by all the judges of the Court of Appeal and the learned lords in the Court of ultimate appeal who delivered judgments in the case of *New Sombrero Phosphate Co. v. Erlanger* (5 Ch. D. 73) and *Erlanger v. New Sombrero Phosphate Co.* (3 App. Ca. 1218); and the same doctrine has been applied in the case of *Emma Silver Mining Co. v. Lewis* (4 C. P. D. 396, p. 508, *ante*).

In the case of the *New Sombrero Company*, the following principles appear to be established. The promoters in order to maintain a bargain they have made with the company, must take

care that a directorate is appointed who shall fairly consider the terms on behalf of the company, and exercise an independent judgment as to accepting the terms or advising the shareholders to adopt them. It is further their duty to make a full disclosure of all material circumstances which may affect the judgment of such directors or of the shareholders who are invited to adopt the contract, including the fact that such promoters are themselves the parties interested in the bargain on the other side; and, if they have recently bought the property, they are (generally speaking and as a presumably material circumstance) bound to disclose the price at which they have bought it.<sup>1</sup> Further the *onus* lies on the promoters in case of the transaction being impeached, to show that they have done all these things, and in all respects acted with perfect fairness in the business.

The defendants in the action were the members of a certain syndicate who had bought a property for £55,000 on their own account, and this was generally admitted in the judgments to be a legitimate transaction, although the promoters might have, at the time of the purchase, entertained the project of getting up a company and selling the property to them at a profit. They got up a company with a directorate of their own nomination, and made a contract with the company so formed for a sale of the property for £110,000. In the result this transaction was set aside. For my present purpose it is unnecessary to state the facts more in detail, but it is instructive to observe the general concurrence of opinion expressed as to the position and duties of promoters who make a bargain with the company they bring into existence.

<sup>1</sup> In regard to *V.-C. Bacon's* decision in *Chesterfield, &c. Co. v. Black* (26 W. R. 207), it may be observed that in that case the company did not claim to cancel the bargain actually made with them, though they contended they were entitled to the better bargain the promoters had made for themselves with the original vendors. Had the decision been given subsequently to that of the House of

Lords in the case of the *New Sombrero Co.*, it would probably have been enough to say that there was no fiduciary relation at the time of the first bargain, and that the second bargain not being impeached, it was unnecessary to decide whether the promoters had discharged their duty in such a manner as to entitle them to maintain it.

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In his judgment in the Court of Appeal, the Master of the Rolls (Jessel) says (5 Ch. D. 112),—"Understanding, as I do, that the promoters of a company stand in a fiduciary relation to the company which is their creature; . . . persons in a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation. Is it a fair thing to omit stating that they themselves are the owners of the property? That I think is obviously not fair. Is it a fair thing to omit to state that they have just purchased the property at the valuation sanctioned by the Court of Chancery for half the amount? I do not think it is absolutely necessary that in all cases the price given should be stated; but, looking at the peculiar position of the parties, I think it was necessary here, though even if it had been stated, I do not think, looking at the other circumstances of the case, that my judgment would have been different from what it is now."

Lord Justice James says (p. 118),—"A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent. Such full and fair disclosure was not made in this case by the syndicate, which syndicate, it is admitted, were the promoters."

Lord Justice Baggallay (p. 123) said,—"The syndicate were in substance not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances."

On the appeal in the House of Lords, Lord Penzance, after stating the facts, says (3 App. Ca. p. 1229):—"From that statement I invite your Lordships to draw two conclusions:



first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was *brought about by the conduct* and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to show they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir *Thomas Dakin* or Admiral *Macdonald* was aware of the price at which the property had just been bought under the authority of the Court of Chancery, nor, indeed, that they ever knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

"A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

"The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage

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resulting from the relation and mutual position of the parties, whether in matters of contract or gift ; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of showing that he has not used it to his own benefit."

The Lord Chancellor (Cairns, p. 1236) said :—" The promoters stand, in my opinion, undoubtedly in a fiduciary position (with reference to the company which they propose to form). They have in their hands the creation and moulding of the company ; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."

The passages above quoted are I think substantially the statement in varied language of the same principles, and these principles are in the main adopted by the whole of the very strong Court by whom the case was considered, including (besides Lord Cairns and Lord Penzance whose judgments have been already quoted) Lord Hatherley, Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon. It should however be said that Lord Blackburn, with his usual caution, does not commit himself to state what steps the promoters ought to have taken for the protection of the company, it being in his

view sufficient that they did not discharge the burden which at least lay upon them of showing that they had reasonable ground for believing that sufficient protection had been afforded. The only further point I shall take note of here is the reason for the fiduciary relation, based upon the machinery placed in the hands of promoters by the Act of 1862, which is observed upon by Lords O'Hagan and Blackburn.

The observations of Lord Blackburn on this point are as follows (p. 1268) :—" This Act does not in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent."

As an illustration of the second class of cases referred to on p. 514, *ante*, namely, in contracts of insurance, I shall take as an illustration the case of *Bates v. Hewitt* (L. R. 2 Q. B. 595).

The plaintiff, in August, 1864, through his broker in London effected an insurance of a vessel, furnishing the particulars—" *Georgia* S.S. chartered on a voyage from Liverpool to Lisbon and the Portuguese settlements on the west coast of Africa and back." The *Georgia*, which in fact had been during 1863—4 the notorious Confederate cruiser of that name, immediately on sailing from Liverpool was captured by a U.S.

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Duty to communicate material facts.

*Bates v. Hewitt.*

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frigate. The underwriter being sued on the policy set up the defence of concealment. A jury found that the defendant was not aware that the *Georgia* which he was insuring was the Confederate steamer, but that he had at the time of underwriting abundant means of identifying the ship from his previous knowledge coupled with the particulars given by the plaintiff. It was decided that the verdict was in favour of the defendant; that is to say, it was held that the contract was voidable on the ground of the concealment.

This was an extreme case, because some of the judges who held that the contract must be avoided, gave the plaintiff full credit for good faith, and assumed that he had not considered the past history of the vessel material to the risk. The decision however does no more than apply the principle laid down by Lord Mansfield in *Carter v. Boehm* (1 Sm. L. Ca.), and adopted in a numerous train of decisions which have followed on that case (see *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511).

With this case may be contrasted that of *Gandy v. Adelaide Insurance Co.* (L. R. 6 Q. B. 746), where the Court, by a majority (Mellor, Lush, and Hannen, JJ.), but with the dissent of Cockburn, C.J., supported the verdict of a jury holding the fact *not material*, that the plaintiff had resolved not to continue the ship on Lloyd's register beyond the "half time survey" and had so stated to Lloyd's surveyor in answer to a letter from the surveyor informing him that the vessel was due for "half time survey." Cockburn, C.J., in a judgment which I venture to submit is the more forcible in its reasoning, considered it material that the plaintiff had in fact declined a survey; that refusal fairly leading to the inference that the owner is conscious that the condition of the vessel has so far deteriorated that the result of the survey would be unfavourable.

It is undoubted that the fact, if material, and not presumably a matter of common knowledge, must be communicated: or as it is expressed by C.J. Cockburn in *Bates v. Hewitt* (L. R. 2 Q. B. 605);—"The rule established is this: that the person who proposes an insurance should communicate every fact which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against

which he undertakes to protect the assured." As a recent case in which *Bates v. Hewitt* has been followed, I refer to *The Mercantile Steamship Co. v. Tyler*, 7 Q. B. D. 73: where the policy was on chartered freight, and the concealment was that the charter-party contained a clause giving the option of cancelling the charter-party if the vessel should not have arrived before a certain date.

Where, as is commonly the case in contracts of life assurance, there is an express agreement that the statements as to certain facts are the basis of the contract, the person who has proposed the assurance will not be allowed to contend that the facts so stated are not material (*London Assurance Co. v. Mansel*, 11 Ch. D. 363). In this case the Master of the Rolls pointed out (p. 367) that the principle now under consideration, applies equally to all contracts of insurance, although the circumstances which have to be disclosed have been more particularly gone into in the cases relating to marine insurance; and many of these may not be applicable to other kinds of insurance.

The time at which the insured is bound to disclose all material facts in his knowledge is the time when the risk is accepted, and according to the established custom at Lloyd's this is shown by the initialing of the *slip*. Consequently it has been held that if a loss subsequently comes to the knowledge of the assured, the non-disclosure of this at the time of applying for a stamped policy in terms of the slip, is immaterial (*Lishman v. Northern Maritime Ins. Co.*, L. R. 8 C. P. 216; see also *Morrison v. Universal Marine Co.*, L. R. 8 Ex. 197).

Having noted the distinguishing marks of fraud, and what is equivalent to it, I now consider the legal consequences.

Consequences of fraud resumed.

And first I consider the legal consequences of the first kind above (p. 511) mentioned, and in doing so I shall, for convenience, use the word "fraud" in the wider sense there referred to.

What is meant by "voidable."

These consequences have been succinctly stated by Baron Bramwell as follows:—"It is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all

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benefit from it, and restoring the other party to the same condition as before, as far as possible (*Bulch-y-Plum, &c., Co. v. Baynes*, L. R. 2 Ex. 324, 326). Simple instances of the avoidance of a contract on ground of fraud are *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, and *Panama, &c., Co. v. India Rubber Co.*, L. R. 10 Ch. 515.

There must be a fresh act with the intention to rescind.

When it is said that the act is *voidable* two propositions are implied.

The *first* is this.—An act induced by fraud is not the less deemed a free and voluntary act, and so draws with it the appropriate legal consequences. It requires a fresh act to rescind,—that is, to undo so far as it can be undone,—the first act, and to get rid so far as possible of its legal consequences.

Avoidance is complete in regard to persons chargeable with the fraud.

But as to others only prevents new rights being acquired.

The *second* proposition relates to the consequences of the act of rescission, which are complex. As between the deceived person and a person chargeable with the fraud, the effect is approximately the same as if the original act had been void *ab initio*. But, as between the deceived person and persons who are not chargeable with the fraud, the effect of the act of rescission is merely that the primary legal relation created by the first act is *terminated* so that no new rights springing immediately out of that relation, can arrive *subsequently* to the act of rescission. And to say, as between such persons, that the act is *voidable* means nothing more than this.

To explain this more particularly:—Suppose that B. by fraudulent misstatements has induced A. to sell goods to him; and further suppose that, either by the sale itself (as in the case of a bargain and sale of goods) or by subsequent appropriation, the complete title to the property in the goods has become vested in B. according to the intention of the sale: and further suppose the same goods to have been again bargained and sold by B., to C. who is innocent of the fraud:—it will be too late for A., in a question with C., to assert his right on the discovery of the fraud to rescind the transaction so as to re-vest the title in himself as owner. The right of B., although it was defeasible in his own person, has passed to C., so as to vest in him an indefeasible right and title to the goods (*White v. Gordone*, 10 C. B. 919; *Stevenson v. Newnham*, 13 C. B. 285; see also *Bubcock v. Lawson*, 4 Q. B. D 394).

The principle has been well expressed by saying that fraud is no *vitium reale* affecting the subject (Stair, I. 9, 15); and it is exactly the same principle which applies where an agreement for the sale of land has been executed, and the land conveyed so that the public title<sup>1</sup> has been acquired by an innocent purchaser.

But if the transaction between A. and B. has remained in contract *unexecuted*—or, in the case of land, has remained in agreement giving what is called an *equitable title* merely,—then C. by dealing with B. acquires no better right than B. has. The rule is then “*assignatus utitur jure auctoris*” (Stair, IV. 40, 21); or, the purchaser takes subject to the *equities* attaching to the original obligation. Thus if A. was fraudulently induced by B. to enter into an agreement with him for the sale of land, but no conveyance of the land has been executed; or if A. has been fraudulently induced to enter into an executory contract for the sale of a chattel; or to grant a bond for £1000:—none of these instruments in the hands of a purchaser claiming performance of the obligation, would avail against A.’s defence that the ostensible right had been obtained from him by fraud.

Again, suppose the transaction to have been executed between A. and B. so that B. has completely acquired the property in the subject; but that after contract between B. and C. and before any transfer of *property* to the latter, notice is given by A. to rescind. I apprehend this notice would not affect any right of specific performance or specific delivery which C. might have acquired by his contract. A.’s right as against B. to have the property revested in him, as well as C.’s right acquired by his contract, would be in the nature of an *equity*, or *jus ad rem*. And C.’s would be the prior in time.

As the person deceived may by a fresh act rescind, it is equally in his option to confirm what has been done, and to hold

The person deceived may affirm instead of rescinding.

<sup>1</sup> I here borrow the expression “public title” from the Scotch jurists. In spite of the fact that publicity of conveyances has become in England a mere *scintilla juris*, I think the expression is on

the whole the most appropriate to mark what has been inadequately and would now be inappropriately marked by the expression “legal estate.”

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the other party bound thereby. If, after notice of the fraud he does any act affirming, or (to use the Scotch term) *homologating* the transaction, as by receiving rent under a lease obtained by fraud, he will be afterwards barred from challenge.

And in either case is bound by his election.

The principles of the law on this subject are very clearly laid down by the judgment of the Exchequer Chamber in *Clough v. London and North Western Ry. Co.* (L. R. 7 Ex. 26, 34), which may be abstracted as follows:—"The fact that the contract was induced by fraud gives the party defrauded a right on discovering the fraud to elect whether he will continue to treat the contract as binding, or will disaffirm the contract and resume his property. Election is determined by express words or act, and if a man once determines his election it is determined for ever. But he may keep the question open so long as he does nothing to affirm or repudiate the contract; subject however to this that if, in the interval while he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he had determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

If, after discovery of the fraud, the person deceived has elected to keep the contract, he cannot afterwards repudiate it, though he may discover another incident in the fraud (*Campbell v. Fleming*, 1 Ad. & El. 40).

In marine insurance, issuing a policy according to the slip is not election.

In marine insurance contracts, it has been held by the Exchequer Chamber reversing the decision of the Court of Exchequer that,—it being proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed—the issue of the policy after notice of a misrepresentation or concealment of facts material and not known to the underwriter at the time of initialing the slip, does not in law constitute an election to affirm the contract (*Morrison v. Universal Marine Co.*, L. R. 8 Ex. 197).

Consequences of

When the contract induced by fraud is that of partnership.



it is obvious that rights of innocent parties may quickly supervene. Creditors of the firm whose debts are contracted after the entry of the new partner are of course entitled to hold him liable. And another partner may come in, who is innocent of the fraud. The partnership must, it is conceived, in regard to all such persons, be considered and treated as having subsisted until terminated by the joint act of the partners or by the appropriate proceedings for dissolution. There may be great difficulties in the case of an ordinary partnership in adjusting the legal consequences of the connection so commenced and so terminated.

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fraud whereby a person is induced to enter a partnership.

But in an incorporated company constituted under the Companies Act, 1862, the questions are in some respects simplified. The company so long as it goes on is a corporation to whom fraudulent misrepresentation may be imputed, to the effect of giving the deceived person, as against the company, the right to be restored to his original position; and as against all persons other than the company, the right to terminate his connection with the company in due legal form. His connection with the company being so terminated, the law of partnership as modified by the Acts, provides a solution for all questions. If the company continues solvent, and a *going* company, he is entitled to relief and indemnity against the company in respect of any claims made against or payments made by him as a member. In that case, as to any liability to other persons, *cadit quæstio*. But, if the company is wound up, so that the corporation ceases to exist except for the purpose of liquidation, the rights and liabilities are determined by the fact of membership at certain fixed epochs.

The same in a company incorporated under the Act of 1862.

And *first*, every person who is a member at the instant of the commencement of winding up is liable to contribute to the extent of his share in the subscribed capital; and, *secondly*, if the amount recoverable from all those who are members at the commencement of winding up is not sufficient to answer the liabilities of the company, those who have been members at any time during the twelve months immediately preceding the commencement of winding up may be made liable (by being settled on what is called the "B" list) to an extent limited by having regard to the amount of the debts contracted before

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they ceased respectively to be members (on this see *Webb v. Whiffin*, L. R. 5 H. L. 711, 738).

Two leading cases as to rescission of membership on the ground of fraud.

*Kisch v. Venezuela Ry. Co.*

I shall now give a brief summary of two leading cases, where shareholders deceived by fallacious statements in the *prospectus* of a company, have, by prompt action upon timely advice, and after a resort to the ultimate Court of Appeal, succeeded in severing their connection with the company.

The first is *Kisch v. Venezuela Ry. Co.* (L. R. 2 H. L. 99).

The company was registered in July, 1864, under the Companies Act, 1862, with a capital of £500,000. Its professed objects were the making of certain lines of railway in Venezuela. The prospectus set forth the valuable privileges enjoyed by the company under grants of the Government, and, amongst other things, it made this statement: "A contract has been entered into by the company with a responsible contractor based upon surveys, plans and sections approved by the Government, for the completion of the line from Puerto Caballo to San Felipe, including stations and rolling-stock at a price considerably within the available capital, and the works will be commenced forthwith. Security has been taken for the due fulfilment of the contract. The contractor also, in consideration of receiving a large quantity of timber along the line for his own use, guarantees 2½ per cent. on the paid-up capital during the construction of the line." The prospectus further stated: "The engineer's reports, maps, plans, &c., may be inspected, and further information obtained at the offices of the company." In July, 1864, Kisch applied for 100 shares, paying the sum of £100 as a deposit to the company's bankers. The whole number of shares were immediately allotted to him. In the same month of July, after ineffectually trying to persuade the secretary of the company to get the number of his shares reduced, he paid a call of £2 per share. In September a further call of £2 per share was made which Kisch did not pay. The solicitor of the company having applied to him on the subject on the 11th November, was answered by Kisch's solicitor asking permission to inspect the concessions and contracts referred to in the prospectus. The application was granted, and Kisch and his solicitor examined the documents

on the 22nd of November. An action was commenced by the company for calls, and on the 28th of January, 1865, Kisch filed his bill against the company praying to be released from his contract on the ground of the fraudulent misrepresentations of the directors.

His claim was held good by the decision of the ultimate Court of Appeal (May, 1867) affirming the judgment of the Lords Justices who had reversed a decree of V.-C. Stuart, and had ordered repayment by the company of all sums paid by the plaintiff with interest at £4 per cent. The Court decided, in effect, that there were fraudulent misrepresentations in the prospectus, on the faith of which Kisch was induced to join, and that the fraud of the directors who issued the prospectus was imputable to the company. Of these misrepresentations two were of the nature of *suppressio veri*, namely, 1st, The omission of all mention of the important fact that the privileges of the Government concession had been purchased by the company for a sum no less than £50,000; and 2ndly, The suppression of the fact that the liability of the contractor upon his guarantee of 2½ per cent. was limited by the contract to £20,000. And two were of the nature of *suggestio falsi*, namely, 1st, That the contract was entered into by a responsible contractor, the fact being, as the directors ought to have known, that he was a person of means totally inadequate to guarantee the carrying out of transactions of such magnitude as those contemplated by the company: and, 2ndly, That the contract was considerably within the available capital; the fact being that the margin was only £30,000 out of the capital of £500,000 proposed to be raised.

In giving judgment in the case, the Lord Chancellor (Chelmsford, L. R. 2 H. L. 113) quoted and adopted the language used by Vice-Chancellor Kindersley in the case of *New Brunswick and Canada Ry. Co. v. Muggeridge* (1 Dr. & Sm. 381),—“Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which

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is not so, but to omit no fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." He then discussed the prospectus and showed that there was in effect fraudulent concealment and misrepresentation in the particulars above referred to: and as to the legal consequences he agreed with the opinion of Lord Lyndhurst in the case of *Small v. Atwood* (6 Cl. & F. 395) that, "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of Equity a foundation is laid for setting aside the contract which was founded upon that basis."

Lord Cranworth concurred in the decision that the plaintiff was entitled to relief on the ground that there was both *suppressio veri* and *suggestio falsi* in the prospectus on the faith of which he acted. There are, however, some arguments in this judgment (L. R. 2 H. L. 123) starting from the suggestion that the plaintiff *never became* a member of the company; and it is necessary to point out that this suggestion can only be reconciled with subsequent decisions if taken in this sense that the shares were accepted under an implied condition that the acceptance might be recalled if, while things remained entire, and on due enquiry, it should be found that the undertaking was essentially different from that described in the prospectus. In the event, the decree obtained by the plaintiff against the company (which appears to have continued as a going concern) gave him (except as to costs) complete restitution. But, as will be seen presently, the effect would have been different if a winding up had supervened.

Lord Romilly and Lord Colonsay concurred in the decision, the former making some important remarks in regard to the necessity of immediate election by a shareholder who discovers that he has been deceived. In the case in point he concurred in thinking that the plaintiff was not debarred by laches. But

he added some remarks by way of caution as to the contrary result which might have arisen in case of a person remaining for some time a member of the company without fully employing the means which he has of ascertaining his position.

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The *second* case is that of *Reese River Silver Mining Co. v. Smith*, which came by way of appeal before the House of Lords in March, 1869 (L. R. 4 H. L. 64).

*Reese River  
Silver Mining  
Co. v. Smith.*

The company was registered on the 5th of June, 1865, with a capital of £100,000 in 20,000 shares of £5 each. The memorandum of association stated the objects of the company to be mining and the acquisition of landed estates for mining purposes. On the day of registration the company issued their prospectus, and on the same day a copy of it was received by Smith. The prospectus, after calling attention to the unbounded wealth of Nevada as a mining district proceeded to state that the property which the company had contracted for contained very valuable claims some of which were in full operation and making large daily returns, and so on. Smith applied for and obtained an allotment of 100 shares in the company, paying £1 on each share, and on the 2nd of August, having paid a further sum of £1 per share, he received a share certificate as the registered proprietor. On the 30th of December in the same year, he received notice of a call of £1 per share, accompanied by a copy of what was termed "a most satisfactory letter received this day from our deputation at San Francisco, on their return from the mines at Reese River." The letter was in fact to the effect that the deputation referred to (consisting of two of the directors) had reached the estate after many dangers and difficulties and found the property almost valueless, but this they considered "matter for rejoicing," as they knew that other mines of a first-rate character could be purchased for a far lower figure. They did purchase another mine and returned to London on the 17th January, 1866. On the 19th January their full and formal report was sent out to all the shareholders, and a meeting was called for the 8th of February. By the report it appeared that the deputation had found the property contracted for situated on the slope of a hill where its own and all other workings had been abandoned for months previously. Pending the appearance of the report, Smith had declined to

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pay the call made in December; and on the 6th of February he filed his bill in Chancery against the company to be relieved from his shares and to restrain the company from suing him for the call. An injunction was applied for and granted by Vice-Chancellor Wood on the 20th of April, 1866 (L. R. 2 Eq. 264). On the 27th of April a petition was presented for the winding up of the company, and on the 28th May a winding-up order was made. Smith's name was placed by the liquidator on the list of contributories, and he then, after (in the winding up) applying for and being refused leave to proceed with his suit, applied by the summary process of a summons under the 33d section of the Companies Act, 1862, that the register might be rectified by the removal of his name. The Master of the Rolls on the 14th of March, 1867, refused the summons, but the Lords Justices on the 6th of June (the decision of the House of Lords in the case of *Kisch v. Venezuela Ry. Co.*, having been in the meantime pronounced) reversed that order and held that Smith was entitled to have his name removed. The liquidator by leave of the Court appealed from this decision to the House of Lords.

The House by its decision pronounced on the 18th of March, 1869, present Lord Chancellor (Hatherley), Lord Westbury, Lord Colonsay and Lord Cairns, unanimously affirmed the decision of the Lords Justices, and directed that the costs of both parties should come out of the estate in liquidation.

Points of law  
involved in the  
decision.

The following propositions appear to be involved in and to have been authoritatively established by this decision.

1. That the assertion by the directors in the prospectus of facts with regard to the property which they had themselves taken on the authority of the vendor's statements, and which they had themselves taken no means to verify, was a fraud imputable to the company, to the effect that the contract which Smith had been induced to enter by means of that false representation, was voidable at Smith's option.

2. That Smith timely and well exercised that option by filing his bill in Chancery to rescind the contract; and that there having been thus a *bona fide lis pendens* at the time of the winding up, the application to rectify the register was properly made.

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3. The Court being of opinion that the contract ought to be rescinded, that rescission related back to the filing of the bill.

4. In the result (*quoad* creditors<sup>1</sup>) matters were restored to the position in which they would have been if Smith had been a partner up to the date of his filing the bill, and then ceased to be a partner.

It may be remarked that in the case of the *Reese River Co., Smith* had acted with great promptitude. The first indication that anything was wrong was given by the letter of 30th December, the full disclosure was only made on the 19th of January, and the bill was actually on the file on the 6th of February. This shows that not only did the plaintiff make his election at once, but that he and his advisers acted upon it as a matter of urgency.

The deceived shareholder must act promptly.

In the case of the *Venezuela Company*, Kisch had not been so prompt. He and his solicitor had inspected the documents on the 22nd of November, and must then have been fully in possession of the information on which action was taken. Yet the bill was not filed until the 28th of the following January. This delay was doubtless hazardous. In *Kent v. Freehold Land, &c., Co.*, to which I shall revert presently, the true facts were ascertained by the plaintiff on the 20th of July, and on the 24th a letter was written repudiating the shares; but the bill was not filed until the 8th of October. Lord Cairns in that case said (L. R. 3 Ch. 494) that the fact of the letter of the 24th July coupled with the delay to file the bill for two months from that time, put the plaintiff's case in really a worse position than it would have been in otherwise. The ground, however, of the Court's refusal in that case to relieve the plaintiff from his contract, was the intervention of a petition to wind up the company followed by a winding-up order. But the observation of Lord Cairns is important as showing how short a delay might in his opinion be fatal to a claim of relief. The opinion

<sup>1</sup> I say here "*quoad* creditors" because (I apprehend) there was nothing to prevent the plaintiff applying in the winding up for any further relief to which he may have

been entitled as against the company from the facts stated on his bill, and receiving a dividend in respect of any claim which he might so establish (see p. 535, *post*).

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of Lord Romilly in the case of *Heymann v. European Central Ry. Co.* (L. R. 7 Eq. 169) is to a similar effect.

Is a shareholder entitled to accept the prospectus as a representation of what is contained in the articles and documents therein referred to?

Another point in the case of the *Venezuela Ry. Co.* was this. The documents from which the information was at last obtained were referred to in the prospectus, and on application at the office, which was invited, the further information was at once obtained showing the misleading nature of the prospectus. On this point Lord Cairns observes (L. R. 2 H. L. 120) as follows:—"It appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'"

A person who applies for shares in a company cannot, however, be heard (at least after allowing any considerable interval to elapse without repudiation) to say that he did not know the actual contents of the *memorandum* and *articles of association*, which are in fact the terms of his contract. Upon this point I shall quote the observations of Lord Cairns in *Peel's case* (L. R. 2 Ch. 684) quoted and adopted by Lord Chelmsford (Chancellor) in the *Overend & Gurney case* (L. R. 2 H. L. 352): "It is the bounden duty of a person to ascertain at the earliest practicable moment, what is the charter or title deed under which the company, in which he has agreed to become a shareholder, is carrying on business. I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But even when the memorandum and articles of association are not in existence at the time, I think at the very latest, when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection."

Upon the same point Lord Cranworth in the *Overend &*



Gurney case (*Oakes v. Turquand*, L. R. 2 H. L. 369) remarks, "It is the duty of a person taking shares in a company to use all reasonable diligence in ascertaining the terms of the memorandum of association which is in fact his title deed."

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It will be seen from the *dicta* which I have now quoted, to which may be added the expressions of Lord Romilly in *Ex parte Briggs* (L. R. 1 Eq. 486), and of the Lords Justices Turner and Cairns in *Wilkinson's case* (L. R. 2 Ch. 540), that there is an important distinction between those facts on the one hand which might have been ascertained by perusal of the *memorandum* and *articles* constituting the deed of partnership itself, and those facts on the other hand which could only have been ascertained by the inspection of other documents referred to in the articles or in the prospectus. It must be remembered that by the Act of 1862 (sec. 15), the *articles of association* when registered, bind the company and the members thereof to the same extent as if each member had signed and sealed them; and this gives point and weight to the above-mentioned *dicta* showing the duty of the shareholder from the outset to acquaint himself with the contents of these documents.

It appears from the result in the case of *Smith v. Reese River Co.*, that where winding up of the company ensues after the deceived shareholder has taken legal proceedings to sever his connection with the company, he does not in effect become restored as against the company to his original position. For assuming that the Court would in such a case order repayment of his deposit and calls and the costs of his action, if properly conducted, it is clear that he would not have a preferential claim against the assets of the company but only a claim ranking *pari passu* with other claims in the winding up. (See *Ship's case*, 13 W. R. 1016). It seems the logical consequence that, if a winding up commenced within twelve months of the commencement of the action by the shareholder claiming relief, he should be liable to be settled upon the "B" list. But in a case of gross fraud where the directors had, at the request of the applicant for shares, *cancelled* his allotment, Lord Chancellor Hatherley, reversing the decision of Vice-Chancellor Wickens, decided that he should not be settled on the "B" list (*Wright's*

Where winding up ensues deceived shareholder not restored to his original position.

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case, L. R. 12 Eq. 331 ; 7 Ch. 55). I do not think the grounds stated for either decision in this case satisfactory ; though perhaps the result might be justified on a principle similar to that on which an insolvent buyer is entitled to decline delivery and offer rescission of a contract of sale (see p. 362, *ante*).

Where insolvency (followed by winding up) occurs before action for rescission, the right to relief against the company is gone. Two leading cases.

I now consider the important difference which the position assumes, if before the shareholder has commenced legal proceedings for rescinding the contract, a declared insolvency of the company occurs, followed by a winding up order. The leading cases upon this point are *Addie v. Western Bank of Scotland* and cross appeal, L. R. 1 H. L. Sc. 145) and *Oakes v. Turquand* (the Overend and Gurney case, L. R. 2 H. L. 325).

*Addie v. Western Bank of Scotland.*

*Addie v. Western Bank of Scotland* (L. R. 1 H. L. Sc. 145) was an appeal arising out of the failure of the Western Bank of Scotland, the most notable event of the monetary crisis of 1857. The action had been raised for the purpose of setting aside certain transfer deeds made upon the purchase by Mr. Addie from the bank of their own shares and claiming against the bank *restitutio in integrum*. Addie alleged that he had been induced to take these shares on the false and fraudulent representations of the directors who issued a report stating that the bank was in a flourishing condition at the time when they knew, or from their means of information must be presumed to have known, that the bank was hopelessly insolvent. In the meantime and before the action was commenced the bank had closed its doors, and the company, which had previously been an incorporated partnership, had been registered under the Joint Stock Companies Act, 1856, for the purposes of liquidation. Before the failure Addie had received dividends to a considerable extent from the bank.

The learned lords who decided the appeal seem to have been impressed with the view that Addie's right to have the contract rescinded would have been clear, if only he had claimed to have it rescinded while matters were entire, that is to say, before the bank stopped payment. But they were unanimously of opinion that he was deprived of his right to rescind the contract by the change in the character and condition of the company.

The question was indeed discussed whether the mere change of the company from an unincorporated to an incorporated banking company for the purpose of more conveniently winding up its affairs so changed the character of the shares purchased as to render *restitutio in integrum* impracticable. But no doubt was entertained that such registration, combined with the fact of the bank stopping payment and actually being in liquidation, constituted this complete change of character. And as the relief sought was in the pleadings appropriately termed *restitutio in integrum*, so the giving back shares in a going company, which would have been *restitutio in integrum* on the other side, being impracticable, the claim was held to be barred. The Lord Chancellor (Chelmsford, L. R. 1 H. L. Sc. 160) quotes and adopts the statement of the principle which is neatly put in the case of *Clarke v. Dixon* (E. B. & E. 148), by Mr. Justice Crompton, who, after adverting to the rule of law that a contract induced by fraud is not void but voidable at the option of the party defrauded, said :—" It seems to me to follow that when the party exercises his option to rescind the contract he must be in a state to rescind ; that is, he must be in such a situation as to be able to put the parties into their original state before the contract." <sup>1</sup>

The case of *Oakes v. Turquand* (L. R. 2 H. L. 325), arising out of the Overend & Gurney failure in 1866, came before the Court of ultimate appeal shortly after the case of the Western Bank of Scotland, and with a similar result. The action was commenced some time after the commencement of the winding up, ensuing on the failure of Overend, Gurney & Co. The prospectus, on the faith of which the plaintiff had taken shares, represented the concern as one well known to be in a flourishing condition, whereas in fact, as the directors must have known, it was in an insolvent condition and the venture of the new company was extremely hazardous if not hopeless. No element for ascertaining or suspecting the real condition was contained either in the prospectus or in the memorandum or articles of association ; nor was there practically until after the winding

*Oakes v.  
Turquand.*

<sup>1</sup> The same passage is again quoted and applied by the judgment of the Judicial Committee of the Privy Council in *Urquhart v. Macpherson*, 3 App. Ca. 838.

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up had commenced any opportunity to the shareholders of discovering the real state of the business.

The observations of all the learned lords by whom the case was considered, leave no doubt that the facts would have in their judgment afforded ground for relief against a going company. But the declared insolvency and stoppage of the business of the company followed by a winding-up order totally altered the case. The grounds of the decision amount to this; that the contract being not void but only voidable, and not having been rescinded at the time of the winding-up order, the plaintiff was and must remain until the winding up is worked out, subject to all the liabilities of a shareholder.

After the decision of the House of Lords in *Oakes v. Turquand*, it has been considered a settled point that application for rescission of the contract (*restitutio in integrum*) after insolvency and the commencement of winding up, is too late (*Kent v. Freehold Land, &c. Co.*, L. R. 3 Ch. 493; *Hare's case*, L. R. 4 Ch. 503; *In re Hull, &c. Bank, Burgess' case*, 28 W. R. 792). And the principle equally applies to a voluntary winding up equally with a winding up compulsorily or under supervision (*Stone v. City and County Bank, Limited*; *Collins v. Same*, 3 C. P. D. 282, 309, 310, 315).

City of Glasgow  
Bank cases.

The cases arising out of the City of Glasgow Bank failure in 1878, have carried the principle a step further. Besides distinctly settling the point that the condition of shareholder irrevocably attaches at the date when the bank declares insolvency by closing its doors to the public, so that any action for rescission brought afterwards comes too late (*Tennent v. City of Glasgow Bank*, L. R. 4 H. L. 615; *Nelson Mitchell v. City of Glasgow Bank*, 4 App. Ca. 624); it has been further decided that, the remedy by rescission of the contract being gone, any remedy by action for repayment of calls or otherwise against the company is gone also. Any such relief would be, in effect, inconsistent with the *status* of a shareholder which, *ex concessis*, is fixed upon him (*Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317).

Can fraud be  
imputed to a  
corporate body?

I have already adverted to the point, much discussed in several of the cases above commented on, and particularly in

that of *Addie v. Western Bank of Scotland*, whether a fraud such as is relied on in that and similar cases can be imputed to the company as a corporate body.

Upon this point there is some appearance of conflict in the older authorities. In the case of *Addie* the negative was maintained in argument on the authority of a *dictum* of V.-C. Knight Bruce (*Dodgson's case*, 3 De G. & Sm. 85), that "directors cannot be the agents of the shareholders to commit a fraud," a *dictum* which has been supported on the authority of *Cornfoot v. Fowke*, 6 Mees. & Welsb. 358, and has been echoed in subsequent cases (*Dodgson's case*, 3 De G. & Sm. 85; *Bernard's case*, 5 De G. & Sm. 289; *Mixer's case*, 4 De G. & J. 575; *Pugh and Sharman's case*, L. R. 13 Eq. 571).

The decision in *Kisch v. Venezuela Co.* directly involved the principle that fraud of directors can be imputed to the company in an action for restitution; but it is not uninteresting to quote the reasons which have been given on high authority, in support of the principle.

In an action for restitution,—  
Yes.

Authorities for this : with reasons.

In the case of *New Brunswick and Canada Ry. Co. v. Conybeare* (9 H. L. C. 725), Lord Westbury says :—"I certainly am not at all disposed to advise your Lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and these reports are adopted by the shareholders at one of the appointed meetings of the company and these reports are afterwards industriously circulated, misrepresentations must undoubtedly be taken, after their adoption to be representations and statements made with the authority of the company, and therefore binding upon the company." In connection with this *dictum* I must quote the pertinent observation in Lindley on Partnership (Vol. I. p. 338, 3rd ed.), to the effect that it is difficult to see the principle of a distinction between written reports adopted by shareholders, and those not so adopted; and that the distinction is only sound when the representations relate to matters which the shareholders are competent to deal with, but the directors are not.

In the *National Exchange Co. v. Drew* (2 Macq. 103, 124) Lord Cranworth says :—"What is the consequence of the company receiving such a report (if you can separate the company from the directors), and publishing it to the world ?

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I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company as an abstract being, can represent or do nothing. It can only act by its managers. When therefore the directors, in the discharge of their duty, fraudulently (for I assume this to be so) for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company."

And Lord St. Leonards in the same case (2 Macq. p. 143) says:—"I have certainly come to this conclusion, that if representations are made by a company fraudulently for the purpose of enhancing the value of their stock and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company; it is their own representation."

All the opinions just cited are quoted and adopted by the Lord Chancellor (Chelmsford) in giving judgment in *Addie v. Western Bank of Scotland*; and Lord Cranworth's opinion there given is substantially to the same effect. He says:—"An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit. But if, by the fraud of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds."

It is to be observed that the first sentence of this last quotation has not passed without challenge. In the later case of *Mackay v. Commercial Bank of New Brunswick* (L. R. 5 P.C. 394), the Judicial Committee of the Privy Council, by their judgment delivered by Sir Montague E. Smith, gave relief against the defendant company who were a corporation, in an action on the case in the nature of an action of deceit,—the plaintiff having established that they had suffered damage, and

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that the defendant company had commensurately profited by the fraudulent representation of their agent. This quite accords with Lord Cranworth's statement as to the substantial relief to be given, though it disregards his *dictum* on the point of pleading. The *dictum* is again adverted to by Lord Selborne (in the case of *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 327), who while maintaining the substantial accuracy of Lord Cranworth's statement of the law admits that his *dictum* on the point of pleading may be technically inaccurate.

The mere point of pleading is now of little importance, and the result of the cases,—although mostly concerned with misrepresentations by directors of companies in actions for rescission, and in these cases the word "fraud" has been (as pointed out p. 511, *ante*, and p. 550, *post*) often used in an equivocal sense,—is to lay down a principle which is assumed to belong to the general law of agency; namely, that the fraud of the agent acting for and for the benefit of the principal, and within the scope of his authority as agent, may be imputed to the principal *to the effect of obtaining restitution*. I here use the word "restitution" as in itself implying that the effective relief against the principal is commensurate with the benefit presumably derived by him from the transaction. For though I do not find it anywhere expressly decided that the relief is strictly so limited, I think this is the general tendency of the decisions. Besides the other cases (p. 538, *et seq.*) above commented on, I here refer particularly to *National Exchange Co. v. Drew and Dick* (2 Macq. 103); *Barwick v. Engl. Joint Stock Bank* (L. R. 2 Ex. 259, 266); *Weir v. Barnett* (L. R. 3 Ex. D. 32, 38); *Swire v. Francis* (3 App. Ca. 106); *Ex parte Adamson, In re Collie* (8 Ch. D. 807, 822); Lindley on Partnership, 3rd ed. pp. 329—339.

The principle assumed to belong to the general law of agency.

As further bearing on the principle and by way of contrast I will here cite the case of *Swift v. Jewsbury* (L. R. 9 Q. B. 301), where the manager of a bank being applied to by another bank manager for information as to the responsibility of a customer (being information which it is usual for bankers to furnish to each other when applied to) wrote and signed a letter, as manager, containing statements which were intentionally mis-

*Swift v. Jewsbury.*

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leading, and on which the customer of the other bank for whom information they were intended acted to his prejudice. The Court of Exchequer Chamber unanimously reversing the decision of the Queen's Bench held that the representation was that of the manager personally and not of the bank, and held the manager personally, and not the bank, liable for the consequences. Lord Justice Bramwell said (p. 315) :—"No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself; but I think that ought to be held in as few cases as possible, and clearly not in this case, because in this case, to my mind, the inquiry is not made of the bank, but is made of the individual. It is true that the jury have found that it was within the scope of the manager's authority to give the information he asked for, and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to show, and in order that a corresponding courtesy might be shown to them; but in no other sense was it his duty or within the scope of his authority to do it. He had permission to do it, and ought to do it, but the application is made to him individually, and his individual knowledge of the matter is trusted." The Judges of Appeal it may be remarked call the representation *fraudulent*; but on the view they took that the statement was that of the manager *personally*, this can hardly have been material if the statement was untrue in fact,—the circumstances clearly implying an invitation to act upon it. In *Chapleo v. Brunswick, &c., Society* (51 L. J. 2 B. D. 372) no fraud was alleged, but the directors, acting *ultra vires*, were held responsible for representing their secretary as empowered to receive money on loan for the society. A similar decision was arrived at in *Richardson v. Williamson* (L. R. 6 Q. B. 276) where the defendants as directors of a building society which had no power to borrow gave a receipt as for money lent to the society.

Arrangement to avoid multiplicity of suits in cases of fraud will be sustained in the winding up.

When disclosures are made as to the real state of a company resulting in a determination by a number of shareholders to repudiate their membership, on the ground that they have been fraudulently induced to join; the reasonable course is that they



should consult together about the legal proceedings to be taken ; that an action should be commenced in the name of one, that the others should intimate to the company their intention to repudiate the contract ; and that, in order to avoid a multiplicity of suits an arrangement should be come to between the recusant shareholders and the company to the effect that the former should not be prejudiced by their not taking proceedings pending the suit of the first shareholder. If this is done the shareholders so intimating their intention to rescind their membership will not be prevented from doing so even by a winding up intervening (*Estates Investment Co., McNiell's case*, L. R. 10 Eq. 503 ; *Powle's case*, L. R. 4 Ch. 497). The principle is that a person must not play fast and loose in such a matter, and the fact that a suit by one shareholder is pending is in itself no excuse for delay on the part of another (*Estate Investment Co., Ashley's case*, L. R. 9 Eq. 263). But, where the election has been irrevocably made, and the only object is to avoid multiplicity of actions, the Court will in the winding up give effect to the arrangement for that laudable object.

In cases relating to companies it is necessary to distinguish those where a person on the register of shareholders has obtained relief on the ground that he has never agreed to become a member. These are broadly distinguishable from the case where a person has been induced to become a member by fraud (*Dixon v. Evans*, L. R. 5 H. L. 606, 613).

Cases where there has been no agreement to take shares distinguished from cases of membership induced by fraud.

For instance, a person may have agreed to become a member subject to a condition precedent which is never fulfilled (*Dixon v. Evans*, *supra* ; *Carling's, &c., case*, 1 Ch. D. 115 ; *Ander-son's case*, 26 W. R. 442, 445 ; *Pellat's case*, L. R. 2 Ch. 527 ; *Simpson's case*, L. R. 4 Ch. 184). *Simpson's case* shows that if the contract to take shares is expressly made subject to a condition precedent, a waiver of the condition is not easily presumed.

*E.g.*, Condition precedent not fulfilled.

Many cases have arisen out of a variance between the prospectus containing the invitation to which the application for shares is a response, and the memorandum or articles of association constituting the deed of partnership of a company on the share register of which the applicant's name has been

Variance between prospectus and subsequent articles.

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placed. The contention in such a case is that the company of which he appears a member according to the *prima facie* evidence of the register, is one of which he has never agreed to become a member.

In such a case as last mentioned the rule is this. If the memorandum and articles are in existence as registered documents at the time of the application for shares, the applicant will be taken to have assented to their terms by the mere fact of applying. If these documents are not then in existence, he will be allowed a reasonable time for inspecting them when published, but the law holds it to be his duty to do this at the earliest possible opportunity (*per* Lord Cairns in *Peel's case*, L. R. 2 Ch. 684, quoted and adopted by Lord Chelmsford in *Oakes v. Turquand*, L. R. 2 H. L. 352). It is his duty to do so at latest immediately on receiving a letter of allotment (*Peel's case*, L. R. 2 Ch. 684; *Oakes v. Turquand*, L. R. 2 H. L. 352, 356, 359; *Madrid Bank, Wilkinson's case*, L. R. 2 Ch. 536). And if, after the memorandum and articles come into existence, he does any act implying membership, such as paying a call or sum of money payable on allotment (*Lawrence's case*, *Kincaid's case*, L. R. 2 Ch. 412), executing a transfer (*Crawley's case*, L. R. 4 Ch. 322), or receiving a dividend (*Kent v. Freehold Land, &c., Co.*, L. R. 4 Eq. 600), such acts will be taken as conclusive evidence that he has consented to become a member on the terms of these instruments.

According to the course of business usual in the formation of these companies, evidence of membership is constituted by the applicant for shares receiving a letter of allotment and, if the memorandum and articles were not registered at the time of application, it must further appear that he has acquiesced in the notice which the letter of allotment conveys. In default of some definite act, such as payment of the money payable on allotment, &c., as above mentioned, such acquiescence would be presumed, unless reasonable diligence is used for ascertaining the variance and repudiating the contract. In some of the earlier decided cases, as in *Webster's case* (L. R. 2 Eq. 741), and *Stewart's case* (L. R. 1 Ch. 575), considerable latitude was allowed for this purpose. Indeed in the still earlier judgment of the Lords Justices in *Ship's case*, 2 De G. J. & S. 544, the

point that evidence of acquiescence may be constituted on the presumption that a person receiving an allotment of shares is bound to look at the memorandum and articles, was hardly treated as deserving of consideration. But the mischiefs which might arise in questions with other innocent persons, by allowing such laxity in dealing with persons on the register was clearly seen by Lord Cairns, and his decisions in *Lawrence's* and *Kincaid's cases* (L. R. 2 Ch. 412), *Wilkinson's case* (L. R. 2 Ch. 536), and *Peel's case* (L. R. 2 Ch. 684), have tended greatly to fix upon such persons the necessity of promptly examining their position and unequivocally declaring their repudiation of the *status* of membership. It is true that in *Lawrence's case* and *Kincaid's case*, Lord Justice Turner, while concurring in the result, guarded himself from expressing any opinion as to how the matter would have stood if there had been no delay after actual knowledge of the facts. But to the authority of Lord Cairns in the three cases last cited, may be added the strongly-expressed opinions of the learned lords who heard the appeal of Downes in *Ship's case* (*Downes v. Ship*, L. R. 3 H. L. 356, 360). In order to appreciate the effect of these opinions, I shall here state the salient facts in *Ship's case*; and as I shall revert to the case for another purpose I shall here also mention, in some detail, the steps of procedure by which the case ultimately came before the House of Lords.

On the 5th of May, 1864, a prospectus was issued by a *Ship's case*. company described as a Finance Bank, and stating in detail certain particular objects of the company, some of which went beyond that of banking. Towards the end of the same month of May, Ship applied for fifty shares by filling up the form of application attached to the prospectus, and by forwarding it so filled up to the directors with a cheque for £50. On the 1st of June the directors allotted him fifty shares, and on the same day they caused to be registered a memorandum and articles of association of a company having the same name with that in the prospectus, but having besides the objects described in the prospectus certain other objects of a much more extended nature. On the 8th of June a letter of allotment appears to have reached Ship, and on the 13th he sent the directors a cheque for the call of £4 per share. Ship's name was put on

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the register of the company whose memorandum and articles were so registered on the 1st of June, for fifty shares. In December, 1864, the company turned out a complete failure, and shortly afterwards an order was made for winding it up. Ship moved under the 35th sec. of the Companies Act, 1862, to have his name taken off the register; and Vice-Chancellor Wood made an order accordingly. The official liquidator of the company moved the Lords Justices to discharge the order. On the appeal coming on for hearing, Downes, one of the original promoters of the company, asked leave to intervene and to give a notice of motion on his own behalf to discharge the order under appeal; and this he was allowed to do on terms of admitting that he himself was a contributory to the company. On the appeal motion being heard, the Lords Justices, Turner and Knight Bruce, sustained the order of the Vice-Chancellor for removing Ship's name from the register.

From this decision Downes appealed to the House of Lords, but when this appeal came on for hearing, no appeal had been made on the part of the official liquidator. The appeal was heard in the Court of last resort by Lords Cranworth, Chelmsford, Westbury, and Colonsay. The position of matters is thus commented on by Lord Cranworth (L. R. 3 H. L. 556):—

“When, on the faith of a prospectus, a person agrees to take shares in a projected company, the terms of whose business are thereby defined, if those who afterwards form the company include in the memorandum of association terms not to be found in the prospectus, the person who had applied for shares on the faith of the prospectus may refuse to accept an allotment of shares and may recover back any deposit he may have made.

“If, instead of taking this course he *accepts* his shares, and abstains from examining the memorandum of association with all reasonable diligence, I think the Court ought to be very slow in giving him relief under the 35th section of the Companies Act, 1862. For the relief, it must be observed, is not given at the expense of those who have done him a wrong by registering a memorandum of association differing from that which had been circulated by the promoters of the company before it was formed, but at the expense of the persons who

have taken shares in the company after it has been formed who may never have seen the prospectus, and so are perfectly innocent; and, farther, to the possible damage of creditors who may have trusted the company on the faith of the complaining party being a shareholder."

The views so expressed by Lord Cranworth were entirely concurred in by Lords Chelmsford and Colonsay; Lord Westbury reserving his opinion upon the general legal effect of the position. But all the learned judges concurred in holding that Downes was barred by a personal objection from maintaining the plea of laches against Ship; since Downes was one of those who actually invited Ship to join a company for certain limited objects, and then placed his name on the register of a company with different objects without informing him of the change.

Except where there is an antecedent obligation upon the company to allot shares if applied for, as in *Adam's case* (L. R. 13 Eq. 474), the application for shares is not in itself a contract; it is merely an offer to take shares, and like any other offer it does not become a contract *until it is accepted* by the company, as particularly shown on p. 137, *ante*. To the cases there cited I here add *Levita's case*, L. R. 3 Ch. 36, showing that it is not necessary that notice of acceptance should be communicated in a formal manner if the party is in fact made aware of the acceptance; and *G. H. Levita's case*, L. R. 5 Ch. 489, where there was evidence that the person on the register had constituted another person his agent to apply for and receive notice of allotment of shares. In both these cases the person was held fixed upon the register. In the following cases relief was obtained, *Sahlgreen and Carrall's case* (L. R. 3 Ch. 323), where there was no absolute contract to take shares and no notice of allotment; *Pentelow's case*, L. R. 4 Ch. 178, where the notice of allotment was in its terms conditional, and there remained *locus pœnitentiæ*; and *Gorissen's case* (L. R. 8 Ch. 508), where there was an agreement to *place* shares, but this was held not to be equivalent to an agreement to *take* shares.

No consensus  
at all.

Here may be mentioned two cases in the winding up of the *Empire Assurance Association*; *Challis' case*, and *Somerville's case*, reported together, L. R. 6 Ch. 266. At a general meeting

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of an assurance company, it was agreed to transfer their business to another company, whose objects extended to the business of a loan and guarantee society besides that of assurance; and it was one of the terms of the agreement that the shareholders of the first company should be entitled to and allotted certain shares in the second company for each share held in the first company. Letters were sent by the latter company to the shareholders of the former to this effect:—"I have the pleasure to inclose you certificates for shares allotted to you in the corporation, for which please sign and return me the accompanying form of receipt." It was held that a shareholder who filled up and returned the form of receipt, was a shareholder in the new company; but a shareholder who did nothing, although he retained the certificates, was not.

Where there is no contract, no legal proceedings for rescission are necessary.

Between the class of cases relating to the rescission of a contract on the ground of fraud and those where there is no consent or contract at all, there is this important difference, that in the latter case it is not necessary for the recusant either to obtain the assent of the company to his demand for relief or to commence legal proceedings for obtaining it. It is enough that on being informed of the company's intention to treat him as a shareholder, he distinctly and unequivocally expresses his repudiation.

*Baily's case.*

This may be illustrated by *Baily's case* (L. R. 5 Eq. 423, 3 Ch. 592).

B. having seen a prospectus of a company applied on the 6th of October for shares. The company was registered on the 5th of December following, and then issued a prospectus, which B. saw for the first time in January 1866, and which showed that the objects of the company differed from the document in reference to which he had applied. On the 3rd of February he received a notice that shares had been allotted to him, and on the 7th of February he wrote to the secretary saying he had made up his mind to decline taking any shares in the company, and requesting to have his deposit returned. On the 8th of February the secretary wrote that he could not comply with the request to return the deposit as the shares were allotted. B. replied adhering to his withdrawal. On the 14th of February

a call was made but not paid by B. Notices of meetings and dividends were from time to time sent from the company's office to B., but he paid no further attention to them until, towards the end of the year 1867, legal proceedings were threatened to enforce calls. In December 1867, B. moved to have the register of the company rectified by striking off his name. The Vice-Chancellor (Wood) held that, as the notice of allotment came four months after his application, he was entitled to *locus penitentie*. In other words the allotment not having been made within reasonable time of the application, the offer made by the application had presumably expired, and the allotment was not an acceptance of an offer but merely a new offer of shares. He decided that B. having under these circumstances unequivocally rejected the shares, it was not his business to get his name taken off the register until legal proceedings had been taken against him. On appeal the Lord Chancellor (Cairns) in affirming this decision (L. R. 3 Ch. 592) makes the observation that the question was not one in which the creditors of the company had any concern. But as the decision rested on the ground that there never was any contract, I apprehend this could make no difference. And that even the intervention of a winding up cannot affect the right to repudiate membership, where there has been no contract, is clear by the direct authority of *Pellat's case* (L. R. 2 Ch. 527); *Gunn's case* (L. R. 3 Ch. 40); *Sahlgreen and Carrall's case* (L. R. 3 Ch. 323); and *Robinson's case* (L. R. 4 Ch. 330). The same principle holds good in the class of cases where there was only a conditional contract and the condition unfulfilled (*Walstab v. Spottiswoode*, 15 M. & W. 501; *Elkington's case*, L. R. 2 Ch. 511; *Pentelow's case*, L. R. 4 Ch. 178; and *Simpson's case*, L. R. 4 Ch. 184).

The case of *Waterhouse v. Jamieson* (L. R. 2 H. L. Sc. 29) was a peculiar one, in which a transferee of shares was in effect relieved from calls on the ground that he had entered into no contract rendering him liable for such calls. W., who was resident in London, purchased in the market, shares of a Scotch company as shares on which £100 had been paid. A statement to that effect was contained in the recital of the registered articles of association of the company. W., on his purchase

*Bona fide transferee of shares purporting to be paid up. Waterhouse v. Jamieson.*

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received from the sellers the company's certificates of the shares as shares on which £100 had been paid, and his transfers were registered in the company's books with a similar statement. The fact was that nothing had been paid upon the shares. The company was a mere swindle and soon came into liquidation. It was decided by the House of Lords, reversing the decision of the Court of Session, that W. having purchased without notice of the fraud was not liable to pay up the sums which in reality remained unpaid upon the shares. The decision was not expressly based on estoppel, as in the case of the *British Farmers, &c., Co.*, 7 Ch. D. 533; but rather on the ground (which was that of Lord Justice Turner's decision in *Re Currie*, 32 L. J. Ch. 57), that you could not alter the terms of the agreement under which you seek to fix a person with liability.

Second consequence of fraud. Relief by way of damages against author.

I shall now consider the second of the legal consequences of fraud adverted to on p. 511, *supra*; and, as an appropriate sequel to the questions relating to companies already discussed, I shall consider in particular the remedy which a shareholder has against the individual directors or others by whose fraud he has been induced to take shares.

Equivocal use of the word "fraud" as used in cases of rescission.

It here becomes necessary to be a little more precise in the use of language. In the cases relating to the rescission of a contract on the ground of fraud, the word "fraud" is indifferently used to mean and include not only fraud in its proper sense, implying the intention to deceive, but any other breaches of duty which may be considered to have, so far as relates to rescission of the contract, the same effect as fraud. The consequence is that the exact *ratio decidendi* of those cases is left in some obscurity. The *ratio decidendi* may be one or other, or a mixture of all three of the following considerations:—1. Fraud simply; the intention to deceive being for the purposes of a question of rescission, imputed to the company: 2. A duty on the part of the company who issue a prospectus inviting persons to join, to state frankly on the *prospectus* the essential matters which an intending shareholder might reasonably expect to find there; and a breach of this duty entitling the *invitee* to rescission: 3. That the prospectus is the basis of the contract,



in the sense that the applicant for shares relies on it as a *description* of the undertaking which he proposes to join, and that his acceptance of shares is *conditional*, subject to an implied power of revocation, on discovery of an essential misdescription, while matters are still entire, and using due diligence, having regard to the opportunities of information.

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It is further to be observed that the fraud which is imputed (where fraud is imputed) to the company through the act of a director acting within the sphere of his duty as such, is not necessarily of the same complexion as the personal deception, by the same act, of the director himself. Both must be distinguished from the act of a director not within the sphere of his duty, or not done as the officer of the company (*Chapleo v. Brunswick, &c.*, 50 L. J. Q. B. D. 372; *McGowan & Co. Limited v. Dyer*, L. R. 8 Q. B. 141). Such an act cannot be treated as the act of the company, nor can there in such a case be any relief against the company; so that the remedy, if any, would be merely against the directors personally. But when the act is in law deemed the act of the company, there may be also a remedy against the directors personally; and this, whether the deceived person elect to abide by his contract or not.

In regard to the second consequence of fraud, namely, the relief by damages, it becomes necessary to attend to the strict meaning of the word "fraud;" and it will further, I think, appear from the cases that in order to maintain an action against a director personally for damages on the ground of a statement made by him on behalf and as an officer of the company;—an action which, as I think it will also appear, can only be based upon fraud strictly so called;—the fraud must be brought home to that director as its actual author; he must be fixed with the actual knowledge, or want of knowledge, which makes the statement false in intention; and with the actual purpose that his false statement should be acted on.

In questions of damages "fraud" used in strict sense.

For this, the fraudulent intention must be proved in fact.

This principle is very clearly stated in a charge to the jury delivered (March 27, 1861) by Lord Glencorse (Inglis), now Lord President of the Court of Session in Scotland, in an action of reparation for deceit brought against certain directors of the Edinburgh and Glasgow Bank, by a shareholder who

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alleged that he was induced to become one in consequence of their misrepresentations. "You must first of all," he says, "be satisfied that the statement was false in the popular sense: that is to say, that it was not consistent with, but contrary to fact. In the second place, you must be satisfied either that he knew or believed that it was untrue, or that he made it, not having any honest belief in its truth; and thirdly, that he made it for the purpose of deceiving."<sup>1</sup>

*Ship v.  
Crosskill.*

The case of *Ship v. Crosskill* (L. R. 10 Eq. 81) is a good illustration of the weight of the burden which lies upon the plaintiff in order to make good a claim for damages for personal fraud. The case arose out of the identical transactions in respect of which *Ship* had, by the decision of the Lords Justices (*Ship's case*, 2 De G. J. & S. 544), maintained the order for taking his name off the register; and also successfully maintained the decision of the Lords Justices *against the appeal of Downes*. *Ship v. Crosskill* was an action by *Ship* against the promoters personally. *Downes* was also a defendant, and there was some proof (which apparently there was not in the case of *Crosskill*) that he knew of the misleading prospectus. But the Master of the Rolls (Romilly) held, in regard to both defendants, that there was no proof of fraud to maintain the claim for damages. The law applicable to the case is put by Lord Romilly (L. R. 13 Eq. 82) as follows:—"For that purpose (i.e., to make the persons named in the prospectus as directors personally and individually liable to pay the plaintiff the amount which he had paid to the company) it must be established that there was by the prospectus a misrepresentation made by the persons sought to be made answerable, knowingly false, and also that it was made by them with a view to deceive, and that it did deceive the plaintiff."

<sup>1</sup> This is not a precise expression; and possibly was not meant to be precise. The idea suggested (more accurately expressed) seems nearly as follows:—"Thirdly, that ...having this knowledge, or want

of knowledge, which made the statement false—he made the false statement with the purpose that it should be acted on by a person who has acted accordingly."

In *Weir v. Barnett* (3 Ex. D. 32, reported on appeal under the name *Weir v. Bell*, 3 Ex. D. 238), the action was for damages against those directors who had issued a prospectus of a company the shares in which turned out worthless. The prospectus had been prepared by brokers, and the jury found that the facts stated in it were false to the knowledge of the brokers; that the plaintiff was induced by the statements to part with his money; that *none* of the false statements were made by the directors personally, or by the authority of either; but that they were within the authority of the brokers as agents. As to some of the directors it was stated that they had received benefit from the transaction, but as to one of the directors, Bell, whose case was the only one which came before the Court of Appeal, it was found that he had received no benefit. The Exchequer Division held that none of the directors were liable; the brokers being not their agents but agents of the company. And in the Court of Appeal, it was held by the majority, Cockburn, C.J., Bramwell and Brett, L.JJ., against the dissent of Cotton, L.J., that the defendant Bell was not liable. The opinion of the majority was that Bell was not liable simply on the ground that he was guilty of no fraud. Lord Justice Cotton (3 Ex. D. 242) stated that in his opinion, which he thought supported by Lord Chelmsford in *Peek v. Gurney*, "if a defendant has employed an agent to issue a prospectus or other document on the statements of which persons are invited to contract, he will be liable to those who act to their prejudice in reliance on false statements made in this document, if he knew facts which showed the untruth of those statements, but was so careless as to the representations made by his agent as not to do, what in my opinion it was his duty to do, *viz.*, to look at the document issued by his authority."

In *Eaglesfield v. Marquis of Londonderry* (4 Ch. D. 693) the holder of certain preference stock brought an action to make directors personally liable for having issued certificates describing the stock as "No. 1 Preference Stock," on the faith of which he said he had bought the stock, and the Master of Rolls made a decree against them on the ground that they had

*Eaglesfield v.  
Marquis of  
Londonderry.*

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represented the stock as that which it was not. But the Court of Appeal reversed this decision, taking the view that the directors had issued the stock under the *bond fide* belief that it was entitled to rank with No. 1 Preference Stock, and that the plaintiff had bought, not under the belief that it was No. 1 Preference Stock, but under the mistake of law under which he lay in common with the directors, that it was entitled to rank as No. 1 Preference Stock, so that the plaintiff was not in fact deceived. I cite the case here in order to quote the observations of Lord Justice James as to the kind of case which it would have been necessary to make in order to maintain the case of misrepresentation against them in an action for deceit. "In order," he says (4 Ch. D. 711), "to maintain the case of misrepresentation against them, it appears to me that the representation must be wilful and fraudulent. Whether the fraud is supposed to be a fraud in this Court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit." In this view of the law he differed from the Master of the Rolls who had given judgment on the footing (p. 705) that the directors must be responsible for the consequences of a voluntary statement which has misled another person, and putting the case on the principle of *Burrows v. Lock*, 13 Ves. 470, where a trustee was made liable for an erroneous statement made in answer to an intending mortgagee as to the incumbrances of which he had notice. That is to say, he considered the essence of the liability to be the same as that of a person making a statement with an invitation to act on it, without proof of the intention which makes the statement a falsehood. In support of this view the M.R. cites the opinion of Lord Cairns in *Peek v. Gurney*, where, after alluding to the criminal proceedings which had been attempted in the same matter, he says (L. R. 6 H. L. 409), "In a civil proceeding of this kind all that your Lordships have to examine is the question, was there or was there not misrepresentation in point of fact. And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." I shall have occasion (p. 562, *post*) to revert to the language here used by Lord Cairns, and to show in thus allowing that

the *motive* may be innocent, he is referring by way of contrast to the question of criminal liability. That he considers intentional falsehood as part of the gist of the wrong, is clear from what he says towards the commencement of his judgment (L. R. 6 H. L. 402):—"There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated, makes that which is stated absolutely false." With regard to the view of the liability taken by the Master of the Rolls in *Eaglesfield v. Marquis of Londonderry*, I submit that it is more consistent with the general tenor of authority on the subject, to say that when directors issue a prospectus within the scope of their authority, the statements are *prima facie* made by them *as agents only* on behalf of the company; and they are not, without more,<sup>1</sup> to be treated as personally making the statements, or personally inviting people to act upon the statements. That being the case, their liability, apart from fraud, cannot be put higher than if they had expressly contracted with a shareholder in these terms:—"as agents on behalf of the company we warrant the truth of the above statements.—X., Y. and Z., Directors." See *Beattie v. Lord Ebury*, L. R. 7 Ch. 777.

The distinction here discussed between the nature of the representation which grounds a claim for rescission against the company, and an action of deceit against the directors, is again insisted on by the Court of Appeal in the case of *Arkwright v. Newbold* (50 L. J. Ch. 372) overruling the judgment of Mr. Justice Fry (28 W. R. 828) who tried the case without a jury. The prospectus had stated that the directors were to be remunerated "only" out of profits; and Mr. Justice Fry held the plaintiff entitled to damages from the directors on the ground that there was an understanding between the vendors and the directors (which was carried into effect) that the directors should receive some of the vendors' shares in consideration of giving their services. The Court of Appeal held that there was no false representation; and it was ob-

<sup>1</sup> Compare *Swift v. Jewsbury* held to be that of the manager personally, and not that of the bank. (p. 541, *supra*), where, under the circumstances, the statement was

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served that the learned judge had allowed his mind to be diverted from the true issue by a confusion between the question arising in an action of deceit, and the questions arising in actions for rescission of the contract. Lord Justice James (50 L. J. 373) says :—"There are a great number of purely equitable considerations which come before the Courts when they are dealing with actions to set aside contracts or conveyances which have been obtained by reason of not only misrepresentation of a fact, but by reason of any concealment or suppression of a fact which the Courts may have thought ought to have been disclosed, and by reason of any misstatement between the vendors and the persons acting in a fiduciary position for the purchaser which has deprived the purchaser of the advice and assistance which he ought to have had. Those cases stand by themselves and are entirely distinct from such a case as we have before us.

\* \* \* \* \*

Here, the case must be made out, as alleged, that the plaintiff was deceived by the false representation which he alleges was made by the person who prepared and issued the prospectus." And Lord Justice Cotton (p. 376):—"In such an action," (*i.e.*, an action of deceit) "it is necessary to prove that a statement has been made which to the knowledge of the person making it was false, or which was made by a person with such recklessness as to make him liable just as if he knew it to be false, and that the plaintiff acted to his prejudice or damage on the statement made." And Lord Justice Lush (p. 329):—"It is an action for false and fraudulent misrepresentation, and in order to prove that, the party complaining must show that there were false statements in the prospectus, and that by reason of those false statements he was induced to take the shares."

I now proceed to instances of cases where the plaintiff was successful in his claims for damages against the directors personally.

*Henderson v.  
Lacon.*

In *Henderson v. Lacon* (L. R. 5 Eq. 249), the remedy claimed by the bill was both for rescission of the contract as against the company, and for repayment by the directors

personally of the sums paid by the plaintiff to the company and for the expense to which he had been put in the matter. The case was heard before Vice-Chancellor Wood in December, 1867. A prospectus of a company had appeared in February, 1865, making amongst other things this statement:—"The directors and their friends have subscribed a large portion of the capital, and they now offer to the public the remaining shares." On inquiries instituted in the month of June the plaintiff was furnished with a list of the shareholders; and an action for calls having been brought against him in the month of July, his bill was filed on the 25th of that month and an injunction shortly afterwards applied for against the action for calls being proceeded with. The evidence proved, that so far from the directors and their friends having subscribed a large portion of the capital before the issuing of the prospectus, the thing was in fact got up by a speculator to whom these persons lent their names as directors on a distinct understanding that the shares required for their qualification as directors should be given to them as fully paid-up shares and that they should not be required to put any money of their own into the concern. The distinction in principle between the liability of the company and that of the directors personally, in such a case, is stated by the Vice-Chancellor in his judgment (p. 261) as follows:—

"I think the cases clearly show this—that any representation made by the agents of a company which form the foundation of a contract between that company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents. The contract must be annulled. The position of the agents themselves, who make the representations, is different. As Mr. Giffard has observed, and I go with his argument as regards them, if you are to make them personally liable for the consequences of their misrepresentations, not they, but the party for whom they contracted pocketing the proceeds—as in this instance, the company, for whom the directors may be taken to be acting as agents—you must fix them also with a guilty knowledge of the misrepresen-

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tation which is communicated to the person who is to be led into the contract. If you do not fix them with what is technically called the *scienter*, upon an action of deceit, you cannot fix them personally with the consequences of the injury or damage that may result to the plaintiff who has been so deceived."

On the facts before him, however, the Vice-Chancellor (Wood) decided that the directors personally as well as the company, were liable to refund the plaintiff's money.

A very similar case to the one last mentioned is that of *Ross v. Estates Investment Co.*, decided by V.-C. Wood (reported L. R. 3 Eq. 122) affirmed on appeal by Lord Cairns (L. R. 3 Ch. 682).

The result in both suits was to restrain proceedings for the payment of calls and to make the company and the directors jointly and severally liable for the repayment of the sums paid by the plaintiff to the use of the company and for the costs of the suit. In a suit framed in this way, the personal liability of the directors has been treated as a ground of relief subsidiary to the claim for rescission of the contract, and according to the judgment of Lord Cairns in *Kent's case* (L. R. 3 Ch. 495) the plaintiff could not, if the suit failed against the company, make good his remedy against the directors personally in the same suit, but the bill would be dismissed without prejudice to any claim which the plaintiff may have against any of the directors. A similar view has been expressed by Lord Romilly in the case of *Heymann v. European Central Railway Company* (L. R. 7 Eq. 168).

Here may be also mentioned the case of the *Phosphate Sewage Co. v. Hartmont* (5 Ch. D. 394) where a decree was made for restitution against everybody concerned in the fraudulent sale of a voidable concession. This was a case in which, when once the facts were understood, the law was too plain to need statement.

Action against directors personally not easily barred by laches; and not barred on the

Where the claim is not for rescission of the contract but for damages against the directors personally, it is much less easily avoided or barred either on the ground of delay, or on the ground that *restitutio in integrum* has become impossible.



Indeed the very ground of the remedy against the directors personally is that the party has by entering into the contract, suffered damage which no relief competent to him against the company can adequately repair.

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ground that  
*restitutio in  
integrum* is  
impossible.

In the case of *Davidson v. Tulloch* (3 Macq. 783) the nature of the alleged fraud was, that a managing director of a bank had systematically employed his position for the advantage of himself and his friends by making large advances on insufficient security, and by issuing false reports of the state of the bank's affairs; and these allegations were held by the House of Lords (affirming the judgment of the Court in Scotland) as sufficient, if proved, to sustain the action for damages. And it was held to make no difference, that the partnership had continued so long and circumstances had so changed that it would have been impossible to rescind the contract itself.

*Davidson v.  
Tulloch.*

In the case of *Clarke v. Dickson* before referred to (E. B. & F. 148), the plaintiff, suing the company for money had and received, was nonsuited on the ground that his original contract was to take shares in a mining company worked on the cost-book principle and he had remained a shareholder and received dividends for a period of three years, and the company had moreover with his consent been registered as an incorporated joint stock company with limited liability. The plaintiff's counsel urging the hardship of his having no remedy, Compton, J., interposed with the remark, "All remedy is not lost. He can no longer rescind the contract, which would work injustice, but he may bring an action on the deceit, and recover his real damage." And Lord Campbell in the same case said, "The plaintiff by his own showing cannot rescind the contract and sue for money had and received, but must seek his remedy by a special action for deceit. In that action if he proves what he states, he will recover, not the original price, but whatever is the real damage sustained."

*Clarke v.  
Dickson.*

It was in reference to the point now under discussion that I intended (as mentioned p. 545, *supra*) to revert to the appeal case of *Downes v. Ship*. The result of the appeal of Downes in that case strongly illustrates the force of a personal exception in such a case. The question there was between a person whose name was on the register and Downes who improperly

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—though, as appears by the sequel in *Ship v. Crosskill*, without actual fraud—put his name there. Downes—who suggests that the plaintiff comes too late, and that others may have suffered by the name being left on the register,—is properly met by the reply :—“It does not lie in your mouth to say that.” *A fortiori*, where the question is between the deceived shareholder and one actually guilty of fraud in the matter; if the person so guilty says that his adversary is barred by laches or that *restitutio in integrum* is impossible, he may be met by this personal exception or reply.

*Peek v. Gurney*,  
L. R. 6 H. L.  
377.

Finally the point appears clearly established on the authority of the decision of the House of Lords in *Peek v. Gurney*, L. R. 6 H. L. 377. The distinction is clearly stated by Lord Chelmsford (p. 384):—“The suit in the present case is not for the rescission of the contract, but is founded upon the loss the appellant has sustained, and may sustain, in consequence of his being bound by the contract he has entered into. It is a proceeding similar to an action at law for deceit: and the only amount of delay which could be a bar to relief is fixed by the Statute of Limitations, by analogy to which equity generally proceeds in questions of laches.” Lord Cairns gives his judgment upon this point to a precisely similar effect (p. 402).

Various points  
considered in  
*Peek v. Gurney*.

Having touched on the decision of the lords in *Peek v. Gurney*, on the question of *laches*, I must state the other points considered or decided in that case. The opinion was expressed by Lord Chelmsford and Lord Cairns that there was actual misrepresentation in the prospectus such as would have been a ground for relief if the action had been brought by a person who had on the faith of the prospectus applied for shares and to whom shares had consequently been allotted. But all the learned lords present (Lord Chelmsford, Lord Cairns, and Lord Colonsay) considered that the ordinary and primary object of the issue of a *prospectus* of a company is to induce the public to apply for shares; and that the shares having been in fact fully applied for and allotted the function of the prospectus was exhausted. They accordingly decided that the plaintiff, being a transferee and not an original allottee of shares, could not maintain an action of deceit, or a suit in equity for the same

object, against the directors who had issued the delusive prospectus.

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Another point considered in *Peek v. Gurney* was that, in regard to the evidence as to knowledge of the contents of the prospectus, one of the directors occupied a somewhat different position from the others. The effect, however, of the judgment of Lords Chelmsford and Cairns was to treat him exactly like the rest. On attentive consideration of their judgments I think it will appear that this was not on the ground that it was unnecessary to bring the wilful misrepresentation home to this director personally, but that there was sufficient evidence, upon the ordinary presumptions of fact in such a case, that he had actual knowledge. This view is sanctioned by the judgment of Mr. Justice Fry in *Cargill v. Bower*, 10 Ch. D. 502, 514. There appears to me nothing in the opinions given in *Peek v. Gurney*, to throw doubt on the position that the gist of the wrong is *wilful misrepresentation*; though they suggest a more ready inference of the false intention than some of the other cases would appear to warrant.

Can one director be made responsible for the acts of his co-directors in an action for deceit?

The point was also considered whether the right to relief in a suit in the nature of an action for deceit, became transmitted against representatives of one of the persons charged with the fraud. The rule at common law in an action of this sort, being considered an action for damages for a personal tort, could not be so transmitted. But this was not necessarily the case in a suit in equity, and the rule of equity would now prevail in all actions. The rule, according to the opinion of Lord Chelmsford (L. R. 6 H. L. 293) in *Peek v. Gurney*, is that the right of action is transmitted against the representatives of the wrong-doer only if the estate has received benefit from the wrong; and the rule as to transmission to the representatives of the person wronged is, that the right of action transmits if and to the extent that the estate is diminished in consequence of the wrong (*Twycross v. Grant*, 4 C. P. D. 40).

Does an action for fraud survive against representatives?

In the Scotch appeal of *Davidson v. Tulloch* (3 M'Queen, 783) the rule according to Scotch law was held to be (using the language of Lord Cranworth, p. 797), that "if a wrongful act is

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fraudulently perpetrated to the injury of my property, and if the person who has perpetrated that wrongful act dies, I have a right to go against his representatives for redress." The condition, according to the authorities, that the executor should be "*lucratus*," was construed as merely meaning that he should have assets to answer the claim. The point is thus conclusively established in Scotch law, not on any technical rule, but on a principle of equity upon which it is unusual to find an essential difference between the rules adopted in England and Scotland. This suggests that the point requires further consideration before accepting the single judgment of Lord Chelmsford in *Peek v. Gurney* as final to prove that the rule is different in England. In support of this suggestion I think I may claim the expressions which fell from Lord Cranworth in *Davidson v. Tullock* (3 Macq. p. 795) that "if the principle of transmission is not adopted in our system of law, the circumstance is much regretted." In *Peek v. Gurney* the decision of Lord Romilly was in favour of the transmission of the liability (L. R. 13 Eq. 79, 121) though his reasons are not very clear. The reasons of Lord Chelmsford (L. R. 6 H. L. 393—5) are on the other hand clearly stated, but by no means convincing.

Distinction  
between civil  
and criminal  
liability in cases  
of fraud.

Another question suggested by the judgments in *Peek v. Gurney* is what is the difference, or is there any, in principle, between the liability to a civil action for damages for fraud, and criminal liability. In his judgment in *Peek v. Gurney*, Lord Cairns, after referring to the acquittal of the directors on a criminal charge arising out of the same transactions, said:—"So far as motive is concerned they may be absolved from any charge of a *wilful design or motive to mislead or to defraud the public*. But in a civil proceeding of this kind all that your Lordships have to examine is the question, *Was there or was there not misrepresentation in point of fact?* And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done." The distinction between the intention and the motive in reference to the question of liability was, perhaps more accurately, put by the Chief Justice (Cockburn) in his charge in the case referred to

(Finlason's Report, p. 254):—"Every man must be taken *primâ facie* at least to have intended what are the natural and necessary consequences of his acts; and if you find that there was misrepresentation, and that ended in defrauding the parties to whom it was addressed, the fair and legitimate inference is, that the intention was that the act done should carry with it the consequences that have followed from it. But this presumption may be rebutted by the other circumstances of the case; and when intention enters so largely into the consideration of the question of guilt or innocence as it does in a charge of conspiracy and fraud, it becomes most important to look to see what motives could have operated upon the mind of the party charged to induce him to commit the offence."

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Trial of directors  
in Overend,  
Gurney, & Co.

It may indeed be doubted whether the distinction, which undoubtedly is a real one, between criminal liability for fraud and liability to a civil action for damages can be put in very definite language. As the Chief Justice said in the commencement of his charge just referred to, "In a case of this kind, we are, as it were, upon the very confines which separate the civil and the criminal law." The indictment, it may be mentioned, was laid both under the Act (24 & 25 Vict. c. 96, s. 84), and as a charge of conspiracy to defraud the person who might apply for shares. Even in a criminal charge of this kind, the Chief Justice allowed that you might infer the intention from the act. And this inference was very strongly and effectively pressed by the Lord Justice Clerk (Moncrieff) in his charge to the jury in the case of the City of Glasgow Bank Directors. There the directors were charged (under the more elastic form of an indictment according to Scotch law) with the "fabrification and falsification of a balance sheet for the purpose of concealing and misrepresenting the state of the Company's affairs with intent to defraud." There was proof of an actual falsification of the figures appearing on this balance sheet; and the view pressed by the Lord Justice Clerk upon the jury was that *if the directors knew that the figures were so falsified when they issued the balance sheet*, it was immaterial that their motive might have been the (perhaps) innocent one of enabling the Bank to tide over its difficulties.

Liability in an  
action of deceit,  
can it be distin-  
guished from  
criminal  
liability?

Trial of City of  
Glasgow Bank  
directors.

## PART IX.

The real distinction is that in a criminal trial of this kind the issue is determined on a broad consideration of the conduct, in its moral aspect, of the person charged ; and where the facts, in the opinion of the judge, favour the view that the conduct of the defendants has been in the main honest, he will emphatically urge upon the jury the point that the "intention to deceive and defraud" is essential to the offence charged. It is only by the emphasis and reiteration of this, in slightly varied language, and perhaps with the addition of the word "deliberate" that the crime, as distinguished from the delict, can be described. In the case of the City of Glasgow Bank, when once the jury were satisfied that the directors knew of the falsification of the figures before issuing the report, there was no room for question as to the honesty of the act. In the case of *Overend, Gurney & Co.*, the misrepresentation relied on depended on a nice consideration of the meaning of the prospectus as contrasted with the real facts ; and the general conduct and motives of the directors, which the criminal trial brought out in a very favourable light, might well be taken into consideration upon the question whether there was, in a criminal sense, an intention to deceive. That the facts in evidence in *Peek v. Gurney* amounted to misrepresentation on which the defendants were liable in a civil suit, was the opinion of Lords Chelmsford and Cairns ; but, giving that opinion all due weight, it may be questioned whether if such a case had been tried with a jury, a verdict might not, in accordance with the evidence, have been given for the defendants.

Trial of West of  
England, &c.,  
Bank directors.

In the trial of the West of England, &c., Bank directors, which took place before Chief Justice Cockburn in April and May 1880, the question arose out of the statements contained in a published balance sheet. The indictment was laid solely on the statute (24 & 25 Vict. c. 96, s. 84). What was relied on as a falsification consisted, mainly, of the *retention* of an estimate of assets which, being based on the valuation of an iron business taken to by the Bank in liquidation of a debt, had by reason of the depression of trade become delusive ; but there was no suggestion that the figures had been in any way manipulated to produce the result. The trial ended in an

acquittal after a charge to the jury strongly in favour of the defendants.

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In this charge, the Chief Justice, after reading the section of the statute, said, "You must be satisfied on this indictment before you can pronounce the defendants guilty of the offence charged against them of these things: that there has been a falsification, and an intentional falsification, of the accounts made, circulated, and published, by the directors; and you must further be satisfied that the falsification of the accounts has been done with a fraudulent intention, and with the fraudulent intention first to defraud the present shareholders and creditors of the company, and secondly to induce other persons to become shareholders, those who held out the inducement knowing that the company was in an insolvent condition and that they were committing a fraud upon incoming shareholders by the representations which they made as to the value of the assets of the company."

After stating the manner in which an attempt had been made to realise the debt due from the owner of the iron business which the directors had taken over and converted into a limited company (called Booker & Co. Limited) he proceeded: "The property, however, still remained, and the question arises whether in representing the property as part of the assets of the bank the directors were guilty of falsifying the accounts, and whether if those accounts were untruthful they were intentionally so made by the directors with intent to defraud. The first question for you therefore will be whether in valuing this property as part of the assets of the company in the balance-sheets this representation of the value of its assets was false or truthful." Then, after remarking upon the difficulty of laying down a principle for the valuation of such a fluctuating property and describing the valuation actually adopted, he continued:—"Even supposing that the directors were altogether wrong in the valuation they put upon those assets of the bank, that would not be sufficient to support this charge without an intention on their part to defraud is established."

He then, in regard to a reference which had been made on the part of the prosecution to the charge of the Lord Justice

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Clerk in the *City of Glasgow Bank case* already mentioned, remarked upon the unfairness of quoting observations made in an entirely different case on a different form of indictment, and proceeded :—"Are you prepared to say that their accounts are intentionally falsified? But even if you should be of opinion that the accounts were intentionally falsified that alone would not be sufficient to determine the question, because even if you are of opinion that the defendants acted contrary to their duty in treating the property as a real and substantial asset of the company, you will have to say whether you are satisfied that they did so with the fraudulent purpose of defrauding the shareholders and the creditors of the company, or to induce persons to become shareholders in order to defraud them also. There could scarcely have been any intention on their part to defraud the shareholders and the creditors, because it is plain that the very first thing that could be done under the circumstances in the interests of the shareholders and of the creditors was to keep the bank going. Sir J. Holker suggests that that was the very motive of the fraud he imputes to the defendants. But how could keeping the bank going defraud the shareholders or the creditors? No doubt to have made the real state of things known would have been to have produced an immediate depreciation of the property of the shareholders, and it was in the interest of the shareholders that the fact should be kept as it were in abeyance, and not at once disclosed, so as to alarm the public. It would be of no advantage to the shareholders to be told that their shares were worthless. I wish you to exercise your own judgment upon this point, but I confess that I cannot see how it would have been for the advantage of the shareholders that these circumstances should have been made known to them, assuming that the circumstances were such as really to disturb the value of the shares. Of course it may be a question how far concealment of the true state of affairs of the bank induced persons to become shareholders; that is a different matter, and if the intention of the directors was by concealing the true state of things—that is to say, the temporarily diminished value of the shares in *Booker & Co. (Ld.)*—to enable the shareholders to sell their shares and so induce persons outside to buy their shares, that might bring the



defendants within the statute, *although there is considerable doubt upon that point*. You must recollect, in coming to a conclusion as to whether the defendants were actuated by a fraudulent intention, that when these balance-sheets were published the bank was not on the eve of dissolution, that it was a going concern, and likely to last for years. You must look at what was present to the minds of the directors with regard to the present and future position of the company. The bank was at that moment, as regarded the public, under most flourishing conditions, and any man joining it would have become a shareholder in a going and prosperous concern, and would have benefited by its dividends which the directors were able year by year to distribute amongst the shareholders, and if these doubtful securities were realized at any time, and should come back into the coffers of the bank in the form of cash, the new shareholder would benefit by it in the future and his dividends and his bonuses would be increased by their produce. Unless you are of opinion that there was present to the minds of the defendants immediate danger to the bank, and that they made false balance-sheets to meet that danger, I do not see how you can convict them of fraudulent intention. If you are satisfied that there was no such fraudulent intention on their part, this indictment fails."

The charge, it will be observed, suggests the doubt whether a conviction would have been warranted *under the statute*, even if there had been an actual falsification of figures, such as had taken place in regard to the City of Glasgow Bank. Apart from this point, the charge is a good illustration of the mode in which an experienced judge, strongly imbued with the impression produced by the whole evidence in the case, of honest intention on the part of the directors, puts the question of intention to the jury. And yet, it is only by the iteration of the phrase "fraudulent intention," which is hardly stronger than the phrase "purpose of deceiving" used by Lord Glencorse in the civil action above referred to (p. 551, *supra*), that the distinguishing feature of the crime charged is impressed upon the minds of the jury.

I must, in conclusion, advert to the construction or presump-

Companies Act,  
1867, s. 38.

## PART IX.

tion of fraud, which arises by the 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131) which is as follows:—

Prospectus, &c.,  
to specify dates  
and names of  
parties to any  
contract made  
prior to issue  
of such pro-  
spectus, &c.

“Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.”

Construction and  
effect of this  
section.

*Gover's case.*

It was held under this section by a majority of the Court of Appeal (James, L.J., Bramwell, B., and Mellish, L.J., against the dissent of Brett, J.,) in *Gover's case* (1 Ch. D. 182), that the omission to specify an agreement which ought to have been specified under this section did not give the shareholder a right to have his name removed; but only a remedy by action against the person guilty of the omission.

*Twycross v.*  
*Grant.*

The construction and effect of this section was much canvassed in *Twycross v. Grant* (2 C. P. D. 469) which was an action of damages against promoters by an allottee who had taken shares on the faith of a prospectus which it was alleged did not satisfy the statutory requirement. The jury found that the contracts omitted (although not purporting to be contracts by or with the company, or by the promoters *as such*) were material to be made known to the intended shareholders of the company. By the unanimous decision of the Common Pleas (Lord Coleridge, C.J., Grove and Lindley, JJ.) judgment was given in favour of the plaintiff; and this decision stood affirmed through an equal division of opinion (Cockburn, C.J., and Brett, L.J., affirming against Kelly, C.B., and Bramwell, L.J., dissenting in the Court of Appeal. A similar decision is given

by a majority of the Court of Appeal (Baggallay and Thesiger L.JJ., against Bramwell, L.J., dissenting), in *Sullivan v. Mitcalfe*, 5 C. P. D. 455.

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The result on the balance of authority, is that all contracts Result.  
material to be known in order to enable the intending share-  
holders to form a judgment on the proposed enterprise must be  
stated, that a promoter acting contrary to the statute is liable  
in an action of damages to the allottee who has applied for  
shares on the strength of the prospectus ; and that the measure  
of damages (the shares being and having been all along in-  
trinsically worthless, although at one time quoted at a nominal  
premium) is the amount paid upon them.



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